No. 04-33 JUL 6 - 2004

In The

Supreme Court of the United States

LARRY FLYNT and L.F.P., Inc.,

Petitioners,

v.

DONALD H. RUMSFELD,
In his official capacity as
Secretary of Defense and
DEPARTMENT OF DEFENSE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. If the government restricts access to a combat zone where American troops are engaged in battle, must it administer its press access program pursuant to procedures and standards that meet First Amendment requisites?

2. Should the question of whether a First Amendment right of press access to the battlefield exists be decided by reference to this Court's analysis in *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588 (1978), or by use of the test set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980).

3. Should Respondents' motion to dismiss the amended complaint have been granted without allowing Petitioners any discovery?

PARTIES TO THE PROCEEDING

LARRY FLYNT
and
L.F.P., INC.,

Petitioners.

DONALD H. RUMSFELD
In his official capacity as Secretary of Defense,
and
DEPARTMENT OF DEFENSE,

Respondents.

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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JURISDICTION OF THIS COURT

The order of the Circuit Court of Appeals for the District of Columbia affirming the judgment of the United States District Court dismissing Petitioners' amended complaint was issued on February 3, 2004. The order of the Court of Appeals denying Petitioners' petition for rehearing was issued April 7, 2004. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 and Rules 10 (a) and (c) of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

- Set forth in Appendix

United States Constitution, Amendment V

- Set forth in Appendix

Department of Defense Directive 5122.5, Enclosure 3, "Statement of DOD principles for News Media"

- Set forth in Appendix

Fed. R. Civ. P. 12 (b)

- Set forth in Appendix

STATEMENT OF THE CASE

I. Introduction

Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result suspension of credentials and expulsion from the combat zone of the journalist involved.

Department of Defense Directive 5122.5, Enclosure 3, ¶ 3.1.4

Under this Directive, the Department of Defense substantially restricted press access to American combat operations on battlefields in Afghanistan during Operation Enduring Freedom. Though American journalists and publishers historically had great access to combat zones, and at least through the end of the Vietnam War regularly reported from the battlefield, press coverage of United States combat actions in later conflicts has been more tightly controlled. This Department of Defense-ordered restricted press access remained the rule during the military conflicts in Grenada, Panama, the Persian Gulf War, and Operation Enduring Freedom.

In Afghanistan, the Department of Defense used its control of access to the combat zone to deny Petitioners' requests for permission to report on the actions of American soldiers under fire on the battlefield. Petitioners maintain that this "credentialing" and combat zone approval scheme is essentially a press access-licensing program administered at the discretion of Department of Defense. The fundamental question before this Court is whether superintendence of the combat zone press access system is subject to minimum First Amendment protections. Since this is an important question of federal law that has not yet

been decided by this Court, Petitioners respectfully submit that review on certiorari should be granted. Sup. Ct. R. 10.

II. Factual Background and Case History

Soon after President George Bush announced that the United States had commenced military action against al Qaeda terrorist training camps and the Taliban regime in Afghanistan during October 2001, Larry Flynt, the publisher of *Hustler* magazine, requested in a letter to the Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs, that *Hustler* magazine correspondents be allowed to accompany and report on American ground forces in Afghanistan. (Appendix ["A"] 92-94). Having demonstrated a commitment to press coverage of international terrorism long before September 11, 2001 (A 92-93, 105-06), Flynt explained *Hustler's* history of reporting on terrorism and the Taliban, and expressly requested that "*Hustler* correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom" (A 93). No request for transportation, housing or protection of *Hustler's* correspondents was made. Flynt promised that the *Hustler* magazine correspondent would obey any rules the military deemed necessary for operational security (A 94).

Two weeks later, having received no response from Assistant Secretary Clarke to his first application for permission to have *Hustler* magazine correspondents accompany and report news of American ground troops in combat on battlefields in Afghanistan, Flynt wrote Clarke again on November 12, 2001 (A 95-96). Emphasizing that "obtaining permission to provide the American public with first hand battlefield reportage is of great importance to

me," Flynt repeated his request that *Hustler* reporters be permitted to accompany ground troops in combat (A 95).

The Department of Defense finally responded to Flynt in an undated letter faxed to him by Assistant Secretary Clarke's office on November 15, 2001 (A 97-98). While agreeing that "a free press, including its coverage of military operations, is critical to upholding one of the fundamental principles upon which this country was founded," Assistant Secretary Clarke refused to grant the access to ground troop combat operations requested by Flynt on behalf of L.F.P., Inc. and *Hustler* magazine. Instead, Clarke pointed out that other forms of limited press access not requested by *Hustler* were available, including coverage of air strikes, humanitarian aid drops, and interviews of men and women serving in the region (A 98). According to Clarke, access to coverage of ground troops in Afghanistan could not be granted because all of the troops were engaged in undefined "special operations activity," making it difficult to embed media (A 98).

Having been denied permission to have *Hustler* correspondents cover the actions of American soldiers in combat on battlefields in Afghanistan, Flynt and L.F.P, Inc. filed the instant lawsuit in the District Court on November 16, 2001, seeking a declaration of their constitutional rights of press access to the battlefield under 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure (A 74-91). Flynt challenged the Department of Defense's restrictive press access policies on the grounds, *inter alia*, that (1) enforcement of the policies denied Petitioners access to information gathering and news reporting forums traditionally open to American journalists, and violated the First Amendment of the United States Constitution; and (2) through the enforcement of the Department of Defense press access policies, Respondents had imposed an unlawful content-based prior restraint that deprived Petitioners of

their fundamental press freedoms as guaranteed by the First Amendment (A 86-89).

Thereafter, the District Court considered Flynt's motion for a preliminary injunction to restrain enforcement of the Department of Defense press access rules. In a Memorandum Opinion and Order filed January 8, 2002, the Honorable Paul L. Friedman concluded that:

This Court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or our allies or compromise military operations. (A 139).

Despite this determination, however, the District Court refused to grant the requested preliminary injunction, citing increased media access to Afghanistan since Petitioners had filed suit, and observing that the balance of harms and the public interest weighed in Respondents' favor (A 141). Significantly, the court recognized that the Department of Defense had asserted its commitment to press access to military operations in Afghanistan only "somewhat vaguely and with minimal detail," and warned that "[w]hether defendants are doing enough to satisfy the First Amendment or the Due Process Clause are questions that will have to await the development of a fuller record" (A 141).

Petitioners thereafter renewed their specific request for permission to have a *Hustler* reporter "cover actual combat activity carried out in connection with the current

military campaign known as Operation Enduring Freedom" (A 146-47). In a January 15, 2002 letter to Assistant Secretary Clarke, Flynt explained that he had not pursued the limited and non-combat press access Clarke had previously offered because *Hustler* wished to cover ground combat operations, and again asked permission for such coverage, subject to military operational security rules (A 146-47).

More than two weeks later, Petitioners still had not heard back from the Assistant Secretary of Defense concerning their request for permission to have a correspondent report on the continuing American ground troop combat activities in Afghanistan. Accordingly, on January 30, 2002, Flynt sent yet another letter to Assistant Secretary Clarke, emphasizing the time-sensitive nature of *Hustler* magazine's request for press access, and pointing out that the Defense Department's own press conferences confirmed that U.S. combat actions *Hustler* desired to cover (e.g., the January 24, 2002 attack on Hazar Kadam, Afghanistan) continued to occur while Respondents deliberated Petitioners' press access request (A 148-49).

By letter dated February 4, 2002, Assistant Secretary Clarke finally advised Flynt that the Department of Defense relied on Directive 5122.5 in making decisions on press access matters, and provided him with a list of contact numbers for Public Affairs officers involved in Operation Enduring Freedom (A 150-51). Clarke did not specifically address Flynt's request for permission to have a correspondent cover American ground forces' combat zone operations in Afghanistan, but the contact numbers identified who to contact if *Hustler* wanted to have a reporter "embed" with land forces (A 152-53).

Through the exchange of various correspondences in the ensuing weeks, arrangements were made to have veteran war correspondent David Buchbinder join

American soldiers at Bagram air base in Afghanistan (A 159-69). Buchbinder arrived at Bagram air base on March 18, 2002 and immediately informed the responsible military officials that he wished to accompany combat troops in the field. He was advised to put his name on the "Notorious List"--a list of reporters who desired to accompany American soldiers on combat missions (A 180). Six weeks later, Buchbinder still had not been allowed to accompany American soldiers on any missions, combat or otherwise (A 185). More than half a year had passed since Flynt's original request to the Department of Defense for permission to have a correspondent witness and report on American forces in battle in the combat zone, yet such permission still had not been granted.

In pursuit of the "fuller record", recommended by the District Court in its January 8, 2002 opinion denying preliminary injunctive relief, Petitioners had filed an amended complaint on January 17, 2002 (A 99-129). The amended complaint presented ten claims, asserting foremost a request for a declaration that the First Amendment guaranteed Petitioners a right of press access to the battlefield, including *overt* combat operations, "subject to reasonable, necessary and definite regulations designed to protect the safety and security of both the journalists and those involved in military operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations" (First Claim; A 116-17). Notably Petitioners did not seek a declaration that the First Amendment required the Department of Defense to transport, house, or otherwise accommodate members of the press. Flynt and L.F.P. Inc. also alleged that the Defense Department's "Statement of DoD Principles for News Media" (Enclosure 3 to Department of Defense Directive 5122.5) failed to recognize and protect their First Amendment rights of press access, and that Respondents

violated their constitutional rights when they denied Flynt's October 30, 2001 request for reporter access to battlefields in the combat zone —a forum traditionally open to American journalists--during Operation Enduring Freedom (Second, Third and Fourth Claims; A 117-21).

Petitioners further contended that the "Statement of DoD Principles for News Media" employed by Respondents did not contain constitutionally required definite and objective standards for use in determining press access requests, and allowed Department of Defense officials unfettered discretion to deny Petitioners' press access request for arbitrary, capricious or discriminatory reasons (Fifth Claim; A 121-22). Moreover, the "Statement of DoD Principles for News Media" failed to place reasonable time limits on the Defense Department's official decision-making with respect to a press access request (Sixth Claim; A 122-23), and did not provide for a prompt administrative appeal of Respondents' denial of Petitioners' application for press access to American ground forces in Afghanistan (Seventh Claim; A 123-24). Finally, Petitioners reiterated that respondents had imposed an unlawful content-based prior restraint on their exercise of traditional First Amendment press freedoms that could survive neither strict nor intermediate scrutiny (Eighth and Ninth Claims; A 124-25), and sought preliminary and permanent injunctive relief (Tenth Claim; A 125-26).

By a motion filed February 7, 2002, Secretary Rumsfeld and the Department of Defense moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(c) (A 143-44). In the face of Petitioners' opposition to the motion, the District Court found that Petitioners lacked standing to bring their as-applied claims because they had not shown that the Department of Defense had, in fact, denied their request for

access to ground forces in combat in Afghanistan (A 33-34). For similar reasons, the court also concluded that the as-applied claims of the amended complaint were not ripe for adjudication (A 28-33). As to Petitioners' facial challenges, however, the District Court refused to dismiss the amended complaint on prudential ripeness grounds (A 37), and rejected Respondents' contention that the political question doctrine rendered Petitioners' facial challenges non-justiciable (A 38-41). Yet, despite agreeing that "there may be a limited or qualified right of media access to the battlefield," the court ultimately concluded that it would be inappropriate to exercise its discretion under the Declaratory Judgment Act, expressing its hesitation "to announce such a significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism, unmoored to a case or controversy in the traditional sense" (A 43, 46). Accordingly, Respondents' motion to dismiss was granted in an Order and Judgment dated February 14, 2003 (A 46-47).

On appeal, the Circuit Court disagreed with the District Court's determination that Petitioners lacked standing, and that their claims were not ripe. Noting that Flynt and L.F.P., Inc. had asked for immediate access to American ground troops engaged in combat, and that such access was not granted by the Department of Defense, the Court of Appeals concluded that Petitioners had suffered in "injury in fact," and that the constitutional press access question was presented in a concrete factual setting that made it fit for judicial review (A 9-10). The court, however, structured Petitioners' primary constitutional argument more broadly than the question they actually advanced. Rather than limiting the issue to that long pursued by Petitioners--merely that the First Amendment ensured at least a qualified right of press access to the combat zone--the Court of Appeals recast Petitioners' claims to include

requests for "accommodations and protections" of the press in addition to combat zone access (A 8, 10).

Consequently, while Petitioners sought only a qualified First Amendment right of press access to combat zones so their war correspondent could observe and report to the American people on the actions and sacrifices of American solders on the battlefield, the Circuit Court found no cognizable First Amendment right of press access to military "accommodations and protections" Petitioners never claimed the government was constitutionally obliged to offer (A 14-15). Accordingly, the Court of Appeals affirmed the District Court's dismissal of the facial claims of Petitioners' amended complaint on the ground that it was not an appropriate case in which to exercise the court's power to grant declaratory relief pursuant to 28 U.S.C. § 2201. The District Court's dismissal of the as-applied claims of the amended complaint was also affirmed on the ground that Petitioners had not stated a cognizable First Amendment claim, and had not shown that the Directive was applied to them in an unconstitutional way (A 15-16). Petitioners requested a rehearing pursuant to Fed. R. App. P. 40 to rectify the Court of Appeals' construction of their primary claim—and, particularly, the court's misapprehension that there were no government rules preventing a journalist from wandering the combat zone at will—but their petition was denied (A 50, 230-43).

REASONS FOR GRANTING WRIT

POINT I

IF THE GOVERNMENT RESTRICTS PRESS ACCESS TO A COMBAT ZONE WHERE AMERICAN TROOPS ARE ENGAGED IN BATTLE, IT MUST ADMINISTER ITS PRESS ACCESS PROGRAM PURSUANT TO PROCEDURES AND STANDARDS THAT MEET FIRST AMENDMENT REQUISITES

The central issue at the heart of the Court of Appeals' affirmance of the District Court's dismissal of Petitioners' amended complaint on a motion to dismiss prior to discovery is whether the First Amendment guarantees any right of press access to combat zones in which American soldiers are engaged in battle. Petitioners presented this issue squarely to the District Court, which refused to declare their constitutional rights in this regard, and on review the Court of Appeals also avoided deciding this fundamental issue, focusing instead on claims of constitutional entitlement Petitioners never made. Consequently, a serious controversy concerning the extent to which, if at all, the First Amendment affords the press a right of access to combat zones controlled by the U.S. military remains to be determined by this Court.[1]

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[1] Petitioners recognize that the Court rarely grants a writ of certiorari on the basis of erroneous factual findings. Sup. Ct. R. 10. Though this case contains such an error, it also presents an opportunity for this Court to determine, or order determination of, an important issue of law directly presented to the lower courts, but avoided by them.

The salient facts are clear: Respondents control press access to combat zones, and Petitioners asked for access to those combat zones so a war correspondent writing for *Hustler* magazine could observe and report on the battlefield actions of American soldiers. The central legal dispute has crystallized: Respondents contend that they can administer their press-access-to-combat-zones scheme without regard to the First Amendment; Petitioners believe that the Constitution affords at least a qualified First Amendment right of access to the battlefield.

Properly stated, the qualified right of access Petitioners advance does not require that the press "be accommodated and otherwise facilitated by the military in their reporting efforts during combat" (A 10). While Petitioners did seek permission to "accompany" American soldiers during combat (A 93), as a practical matter, coverage of war requires correspondents to be where the troops are fighting, and having journalists wandering the combat zone searching for battles appeared to defeat the purpose of the military's control of access to such zones. However, Petitioners did not, and do not, contend that the military is under any obligation, constitutional or otherwise, to furnish accommodations or other support to journalists in the combat zone. Petitioners seek to establish only that the First Amendment governs the administration of the Defense Department's combat zone press access program, and that question can, and should, be determined without regard to secondary accommodation issues that are not of a constitutional nature.

Confined to the precise constitutional principle Petitioners seek to vindicate, the courts below should have recognized that Petitioners' amended complaint stated a cognizable claim: that the First Amendment guarantees to the press a right of access to the battlefield that is qualified to the extent that certain limitations may be reasonably

necessary to protect the safety and security of those involved in combat operations, and the secrecy and confidentiality of information pertaining to those operations. Contrary to the view of the Court of Appeals, this Court's precedent supports the conclusion that a qualified right of press access exists.

Relying on cases such as *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588 (1978), and *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), the Court of Appeals affirmed the District Court's dismissal of the amended complaint—without any discovery—by reference to circumstances where the federal courts have declined to find a right of access to government information sources of a domestic nature. This approach is counter-intuitive, and also ignores fundamental situational differences necessitating an analytical approach to battlefield access issues distinctly oriented to the unique nature of that First Amendment context. Moreover, the Court of Appeals' reasoning stands in direct opposition to Supreme Court precedent clearly establishing that the First Amendment may be interpreted to provide constitutional status to the freedom of the press to gather news, not just publish it.

Since 1791, the essential purpose of the free press clause of the First Amendment has been to ensure that the workings of government remain exposed to the people. The "free discussion of governmental affairs" intended by the First Amendment, *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434 (1966), requires public access to information concerning the operation of the government. The function of providing this information to the citizenry is left specifically to the press: "The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United*

States, 403 U.S. 713, 717, 91 S.Ct. 2140 (1971) (Justice Black, concurring). As Justice Powell eloquently explained in his dissent in *Saxbe v. Washington Post*, 417 U.S. 843, 94 S.Ct. 2811 (1974), "[a]n informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic." *Id.* at 863, 94 S.Ct. 2811.

Advancement of First Amendment press freedoms often requires a uniquely contextual analysis. *See, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586, 100 S.Ct. 2814 (1980) (Justice Brennan concurring). This is particularly true when the controversy concerns an attempt by the press to obtain access to the workings of government. In this instance, the Department of Defense contends that the press has no constitutional right of access to the operations of government, including even a battlefield. To a great extent, this argument, and the Court of Appeals' decision, is premised on the notion that the press has no greater First Amendment right of access to government information than the public at large. While that may be true by reference to the factual situations of the domestic news gathering cited referenced by the Court of Appeals, the battlefield context of Petitioners' exercise of the First Amendment right at stake here is a crucial distinguishing factor that sets this case apart from *Houchins v. KQED, supra,* and *Center for National Security Studies, supra,* and underscores the need for an analytical framework more sensitive to the important contextual differences presented by a battlefield access question.

For instance, unlike in *Houchins*, where a plurality of this Court concluded that the news media does not enjoy a special constitutional right of access to a county jail that is different than that of the public at large, *Id.* at 15-16, 98 S.Ct.

2588, citizens typically cannot obtain first-hand information concerning the government's conduct of a foreign war, and do not have alternative sources of such information readily at hand (as opposed to the variety of local sources of information available concerning prison conditions). Rather, the American people are heavily dependent on war correspondents for information concerning the progress of foreign armed conflicts and the use of United States military power in furtherance of national objectives. Thus, the press plays a crucial role in assuring that the national debate is fueled by information from independent, non-governmental sources such as newspapers, magazines, radio and television.

Moreover, though the *Houchins* plurality did note that the Court had "never intimated a First Amendment guarantee of a right of access to all sources of information within Government control," 438 U.S. at 9, 98 S.Ct. at 2593-94,[2] that statement was clearly made within the context of the special circumstances of KQED's request for prison access. Significantly, the plurality did not contend that the Constitution could not ever be interpreted to provide for a qualified right of press access to the battlefield.

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[2] Petitioners have never claimed a right of access to all information within Respondents' control. They have not requested that the federal government open up its operations to the media or that the federal government be required to collect or produce information for Petitioners' use. Petitioners seek to impose no duty upon Respondents to take affirmative steps to create information not generally available to members of the public. Rather, Petitioners simply seek access to a public place for the purpose of reporting on the government's exercise of its war-making powers in that locale.

The distinction between past cases addressing media requests that the government open the doors to institutions traditionally closed to the general public and the press access request made in the instant case underscores the need for an analytical approach that more precisely measures the degree of First Amendment protection attendant to a request for press access to a battlefield. The Court of Appeals' approach boils down to a theory that, in the absence of any prior holding on the merits of battlefield access, federal courts' rulings denying a constitutional right of press access in remarkably different domestic factual circumstances should also control whether Petitioners may prosecute their action concerning combat zone press rights. Petitioners submit that the logic of inapposite cases need not be followed to its bitter end, and that the unique nature of the battlefield access request at issue demands that the Court fashion a test befitting the circumstances before it. To that end, Petitioners contend that the approach adopted by the Supreme Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613 (1982), and *Richmond Newspapers, Inc. v. Virginia, supra*, and rejected by the Court of Appeals in the instant case, is most appropriate.

The historic openness of American criminal trials to both the public and the press obviously played an important role in the Supreme Court's determination that a right of access to such proceedings for both the public and the press is constitutionally guaranteed. Accordingly, the *Richmond Newspapers* decision recounts a lengthy history of public access to criminal trials as a prelude to the holding that such trials are presumptively open to the public, including the press. *Id.* at 581, 100 S.Ct. 2814. A similar approach was necessarily followed in *Globe Newspaper*, where the Supreme Court was confronted with a controversy concerning whether both the press and the general public could be excluded from the trial testimony of a minor victim in a sex

offense trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 602-05, 102 S.Ct. 2613.

The *Richmond Newspapers* and *Globe Newspaper* decisions are instructive not only in regard to their recognition of a First Amendment right of press access to criminal trials, but also as an example of how the Court in both cases evaluated the constitutional question before it using inquiries most germane to the type of access requested. Petitioners in the case at bar ask this Court to do no more.

Indeed, review of *Richmond Newspapers* reveals that the Court departed dramatically from the narrow reasoning of its prior decisions in *Saxbe v. Washington Post, Co., supra*, *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974), and *Houchins v. KQED, supra*. As the plurality opinion in *Richmond Newspapers* observed:

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 576-77, 100 S.Ct. 2814 (citations and footnote omitted).

Significantly, in his concurring opinion in *Richmond Newspapers*, Justice Stevens observed that when a majority of the Court in *Houchins* neither accepted nor rejected the contention that the refusal of access to the prison abridged the First Amendment freedoms of speech and of the press, Justice Marshall and Justice Blackmun were unable to

participate in the decision. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 583, 100 S.Ct. 2814. However, with the participation of Justice Marshall and Justice Blackmun in the *Richmond Newspapers* decision, Justice Stevens emphasized that, "[t]oday, however, for the first time the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583, 100 S.Ct. 2814.

Justice Brennan and Justice Marshall echoed Justice Stevens' comments in their own concurring opinion in *Richmond Newspapers.* Noting that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government," *Id.* at 587, 100 S.Ct. 2814, the Justices observed:

> Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 586, 100 S.Ct. 2814 (citations omitted).

Thus, in the *Richmond Newspapers* decision we see an explicit recognition that the First Amendment may be interpreted to provide for a right of access to government operations, and that such right of access is not limited simply to criminal trials. Accordingly, *Houchins* and the other prison cases cannot be read as the definitive interpretation of whether the First Amendment provides protection for the right to gather news on the battlefield, as well as to publish it. Since the First Amendment "has a structural role to play in securing and fostering our republican system of self-government . . . An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 587-88, 100 S.Ct. 2814 (footnote omitted) (Justice Brennan concurring).

Petitioners contend that the unique role of the press in our democracy compels the conclusion that a right of press access to United States military operations in a foreign theater of war inheres in the free press clause of the First Amendment. Central to this analysis is the fact that, during war or other times of armed conflict, press representatives play a unique role in providing the American people with an independent source of information concerning the government's actions in the prosecution of a war in a setting where the vast majority of Americans do not have personal access. *See, Richmond Newspapers, Inc. v. Virginia, supra* at 580, 100 S.Ct. 2814 [noting that press organizations act as representatives of the public]. As proxy to an absent American public, the press is likely to be the only non-government source of information concerning the government's conduct of military action. "Having journalists on the scene ensures that the public eventually will get an independent account of the action. If journalists are not able to use the material they have gathered immediately because of operational security, they

nevertheless will have seen and recorded the events firsthand, and can provide their accounts to the public later." Jacqueline Sharkey, Under Fire: U.S. Military Restrictions on the Media From Grenada to the Persian Gulf (1991), p.32.

American history recognizes the vital role played by war correspondents and confirms the broad access to American soldiers in foreign military theaters traditionally afforded to the press. From the Revolutionary War through Vietnam, press representatives have been witness to unfolding military operations both overt and covert in nature.[3] For instance, reporters were allowed in front line trenches during World War I and had "easy access" to the battlefield in World War II, including landing at Normandy with Allied troops on D-Day. *See, generally,* John E. Smith, From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond, Vol. 26, Colum. J.L. & Soc. Probs. 293-297 (1993). As Smith has noted:

> Both of the Globe standards are equally satisfied when applied to the right of press access to American military conflicts. First... the American media consistently has enjoyed access to military operations -- at least until Grenada. "The unbroken history of press presence at military operations strongly suggests that battlefields should be viewed as presumptively open to the press for purposes of the first amendment, thus satisfying the

---

3 Of course, the precise extent to which reporters have been afforded access to battlefields in the past is a factual issue to be explored in discovery. The only issue presently before the Court is whether Petitioners have stated a cognizable claim.

> first prong of Justice Brennan's Globe test for the applicability of a right of access."

Id. at 309-10 (footnotes omitted).

This tradition of broad access to the war front continued during both the Korean War and Vietnam. *Id.* at 297-98. Indeed, press access to military operations reached its zenith in Vietnam:

> During the Vietnam War the press was granted virtually unlimited access to the areas surrounding military operations...The only official restrictions by DoD during the Vietnam War were guidelines that limited dissemination of specific kinds of combat information that military officials concluded compromised the national security of this country. In contrast, when the United States invaded Panama and Grenada, DoD placed significant restraints on media coverage, particularly in terms of access for news gathering purposes.

Nation Magazine v. U.S. Dept. of Defense, 762 F.Supp. 1558, 1563 (S.D.N.Y. 1991) (footnote omitted). Petitioners sought the opportunity to establish the full historical record of press access to American battlefields to support a *Richmond Newspapers* analysis, but were denied discovery by the District Court's granting of Respondents' motion to dismiss.

Citing *Center of National Security Studies v. Department of Justice*, 331 F. 3d at 934, the Court of Appeals rejected the *Richmond Newspapers* analysis as a means of evaluating whether the press enjoys a qualified right of access to the battlefield simply because "neither the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside

the context of criminal proceedings or the transcripts of such proceedings" (A 12). Ironically, though this Court has never applied *Houchins v. KQED, supra,* to determine whether a First Amendment right of press access to the battlefield exists, the Court of Appeals proceeded to extend the *Houchins* rule that the press has no First Amendment right of access to prisons to cover reporting in the war zone, despite patently obvious and serious differences in the contexts in which such free press rights are asserted. Petitioners submit that this important question of First Amendment jurisprudence should not have been decided by default to an inappropriate prison access analysis, particularly when there is a more fitting test readily available: *Richmond Newspapers.* Accordingly, Petitioners respectfully submit that this Court should grant review to determine whether, on this pre-discovery record, the Court of Appeals correctly determined that the First Amendment does not apply to the Defense Department's administration of its combat zone press access scheme, and, necessarily, whether the Court of Appeals properly applied the *Houchins* analysis instead of *Richmond Newspapers* to this limited record.

POINT II

RESPONDENTS' MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED ON A LIMITED, PRE-DISCOVERY RECORD

Though the District Court may, in its discretion, refuse to exercise its power under the Declaratory Judgment Act, 28 U.S.C. § 2201 if it concludes that issuing a declaratory judgment would serve no useful purpose, it is not mandated to do so on a motion to dismiss a complaint. *Wilton v. Seven Falls Co.*, 515 U.S. 271, 287-88, 115 S.Ct. 2137 (1995); *see also,* 12 Moore's Federal Practice, § 57.42 [1], pp. 57-102 (3d ed. 2001). In the instant case, the District Court

dismissed Petitioners' amended complaint, in large part, because it was reluctant to decide the unsettled issue of a First Amendment right of press access to the battlefield in light of its earlier conclusion that Petitioners did not have standing, and that Petitioners' as-applied claims were not ripe (A 42-46). As the Court of Appeals observed, however, a true case and controversy did exist because, contrary to the District Court's determination, Petitioners were, in fact, denied access to the battlefield (A 10). Yet, despite its jurisdictional conclusion, the Court of Appeals determined on this very limited factual record that it was proper to refuse to extend declaratory relief because the First Amendment does not provide any right of press access to the battlefield, and even if the *Richmond Newspapers* analysis applied, there was no proof in the record of a historical basis for media access to troops in combat or that the Department of Defense guidelines were unreasonable or applied to Petitioners unconstitutionally (A 14-17).

First, regardless of whether *Houchins* or *Richmond Newspapers* applies, Petitioners should have been permitted a fair opportunity to develop a factual record through discovery to support their claims that practical factual evidence and history demonstrate that the First Amendment affords the press at least a qualified right of access to the battlefield. Second, Petitioners should have been allowed discovery to establish that the Defense Department's combat zone press access scheme was not administered in a constitutional way; that Respondents did not honor Petitioners' constitutional press access rights, and used the vague standards of Directive 5122.5, Enclosure 3, to deprive Petitioner (and possibly others) of those rights by inaction, redirection, or delay, without recourse to prompt administrative appeal relief.

The central purpose of the F.R.Civ.P. 8 pleading standard is to ensure that the complaint contains information sufficient to put the opposing party on notice of plaintiff's claim. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99 (1957) (footnote omitted) [noting that Rule 8 requires only "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"]. Petitioners' amended complaint accomplished that objective with ease, with respect to both the facial and as-applied claims, and it should not have been dismissed without any discovery, especially given that Petitioners had suffered injury in fact and presented a serious and live controversy for resolution by the court.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Circuit Court of Appeals for the District of Columbia in order to allow Petitioners to vindicate their First Amendment rights as members of the press to have access to the battlefields in which American soldiers are engaged in combat.

Respectfully submitted,

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No. 04-33 JUL 6 - 2004

In The

Supreme Court of the United States

LARRY FLYNT and L.F.P., Inc.,

Petitioners,

v.

DONALD H. RUMSFELD,
In his official capacity as
Secretary of Defense and
DEPARTMENT OF DEFENSE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appendix to Petition for Writ of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 21, 2003 Decided February 3, 2004

[ENTERED: FEBRUARY 3, 2004]

No. 03-5075

LARRY FLYNT AND L.F.P., INC.,
APPELLANTS

v.

DONALD H. RUMSFELD,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE AND
DEPARTMENT OF DEFENSE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv02399)

Paul J. Cambria, Jr. argued the cause for appellants. With him on the briefs were *Roger W. Wilcox, Jr.* and *John G. Perazich.*

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, *Roscoe C. Howard, Jr.*, U.S. Attorney, and *Mark B. Stern*, Attorney, U.S. Department of Justice.

Before: EDWARDS, SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Larry Flynt and L.F.P., Inc. (the company that publishes *Hustler* magazine) (collectively "Flynt" or "appellants") sued Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense ("DOD") seeking, *inter alia*, injunctive relief against interference with its exercise of a claimed First Amendment right of the news media to have access to U.S. troops in combat operations, and claiming that DOD's delay in granting *Hustler*'s reporter access to U.S. troops in Afghanistan infringed that right. They further argued that DOD's Directive con- trolling media access to military forces facially violates this same constitutional right. The District Court dismissed Flynt's as-applied constitutional claims for lack of ripeness and standing, and refused to exercise its discretion under the Declaratory Judgment Act to declare the pertinent DOD Directive facially unconstitutional. This appeal followed. Be- cause we find that no such constitutional right exists, we will affirm the District Court's decision on other grounds.

I. Background

A. *Hustler*'s attempts to gain access

Shortly after the September 11, 2001, terrorist attacks, the United States military began combat operations in Afghani- stan in support of the global war on terrorism. On October 30, 2001, Flynt wrote a letter to the Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs, requesting that *Hustler* correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as

part of Operation Enduring Freedom." Two weeks later, on November 12, 2001, Flynt wrote Clarke again requesting the same access and complaining about her failure to respond to his October 30 letter. Three days later, on November 15, Clarke sent Flynt a fax stating that access to ground operations was not immediately possible because "... the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity." Clarke explained that "[t]he highly dangerous and unique nature of their work makes it very difficult to embed media" with ground troops, but also stated that there had been "extensive" media access to other aspects of military operations. Specifically, "[s]cores of reporters and photographers have covered the [air] strikes, witnessed the humanitarian drops and interviewed dozens of [soldiers]." Clarke then provided Flynt with contact information for the Fifth Fleet Public Affairs Officer so that *Hustler* could have similar access.

Not satisfied with the access provided by DOD, and that other media outlets had received, Flynt did not contact the Fifth Fleet Public Affairs Officer; rather, he filed this lawsuit the day after he received Clarke's fax. Shortly after filing suit, Flynt sent another letter to Clarke on January 15, 2002, stating that "I did not contact [the Fifth Fleet Public Affairs Officer] because I did not request any such access or similar access. Rather, I specifically requested reporter access to actual battlefield combat activities." The letter also characterized Clarke's description of special operations activities as vague. Two weeks later, Flynt sent another letter to Clarke requesting an immediate response to his January 15 letter. Clarke responded by letter on February 4, 2002, reiterated DOD's position, and again described the access that was currently available. Furthermore, she stated that "all [your reporter] needs to do is work with [DOD's] people on the ground." She also provided Flynt with an extensive list of contact persons and explained that DOD

decisions regarding media access were controlled by Department of Defense Directive 5122.5.

On February 19, 2002, Flynt's lawyer sent an email to Lieutenant Commander Bonnie Hebert, one of the contacts Clarke had provided, requesting "permission to have *Hustler* magazine correspondents accompany and report on the activities of American soldiers on the ground in Afghanistan who are engaged in combat actions." Hebert responded three days later, asking "[w]here exactly in Afghanistan would you like to go?" and requesting the identity of the reporter. This began a series of communications that ultimately result- ed in David Buchbinder, a *Hustler* reporter, arriving at Bagram Air Force Base by May 7, 2002. Once in Afghanistan, Buchbinder placed himself on a list of reporters awaiting access to ground units. Since his arrival in Afghanistan, Buchbinder has filed several stories, at least one of which shows he has accompanied troops on a search for al Qaeda operatives.

B. The Directive

As stated above, DOD decisions regarding media access to combat troops are guided by Department of Defense Directive 5122.5. This Directive, issued on September 27, 2000, assigns the responsibility of "[e]nsur[ing] a free flow of news and information to the news media" to the Assistant Secretary of Defense for Public Affairs. Directive 5122.5. The Directive contains three enclosures. At issue in this case is Enclosure 3, entitled "Statement of DOD Principles for News Media." This enclosure begins with the command that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." ¶ E3.1.1. It then outlines the manner in which such coverage should occur. It allows for media pools, limited numbers of press persons who represent a larger number of news media organizations

and share material, but states that pools are not to be the "standard means of covering U.S. military operations." ¶ E3.1.2. Rather, pools are only to be used when space is limited or areas to be visited are extremely remote. ¶ E3.1.3. It also directs that "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." ¶ E3.1.7. In sum, the Directive represents an attempt to facilitate broad media coverage, and contains few restrictions, including limited restrictions on media communications for security purposes and expulsion for members of the media who violate the ground rules. *Id.* at ¶ ¶ E3.1.4. & E3.1.8. It also includes the caveat that "[s]pecial operations restrictions may limit access in some cases." ¶ E3.1.5.

C. Proceedings Below

Flynt and L.F.P., Inc., filed their initial complaint against the DOD and Secretary Rumsfeld on November 16, 2001, requesting preliminary and permanent injunctive relief. In addition, Flynt challenged Directive 5122.5 on the grounds that (1) enforcement of the policies violated his historical and constitutional rights of access to the battlefield; (2) enforcement of the policies amounted to a content-based prior restraint that deprived him of his First Amendment rights; (3) DOD's denial of his request was not narrowly tailored to further a substantial government interest; and (4) DOD's denial was arbitrary and capricious and made without reference to specific and objective standards.

After a hearing on Flynt's motion for a preliminary injunction, the District Court denied the motion, stating that it was "persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news" about U.S. military operations, subject to

reasonable regulations. *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174, 175 (D.D.C. 2002). That being said, the District Court deter- mined that Flynt's likelihood of success on the merits was "far from clear," *id.* at 176, and that because of the quickly evolving factual situation any judicial decisions would "have to await the development of a fuller record," *id.* at 177.

On January 17, 2002, nine days after the District Court denied his motion for a preliminary injunction, Flynt filed an amended complaint. The amended claim presented ten claims, including: (Claim 1) a request for a declaration that the First Amendment guarantees Flynt a right of access to the battlefield, subject to reasonable regulations for safety and security; (Claims 2-4) a claim that DOD Directive 5122.5 fails to recognize and protect Flynt's First Amendment right of access to the battlefield and DOD's denial of his request violated these same rights; (Claim 5) an assertion that the Directive does not contain constitutionally required definite and objective standards for determining press access; (Claim 6) a claim that the Directive fails to place reasonable time limits on DOD's decision-making process; (Claim 7) a contention that the Directive does not provide for prompt administrative appeal; (Claims 8-9) a claim that the Directive imposes an unlawful content-based prior restraint on the media's constitutional right to battlefield access; and (Claim 10) a request for preliminary and permanent injunctive relief. By motion filed February 7, 2002, DOD moved to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56(c).

In considering DOD's motion, the District Court grouped appellants' claims as follows: claims 1-3, 8-9, and portions of claims 4-7 that alleged DOD improperly applied Enclosure 3 to Flynt's request, were considered as "as-

applied claims;" and claims 4-7 were considered as facial challenges to Enclosure 3. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94, 99-100, 103 (D.D.C. 2003). The District Court also considered Flynt's request for injunctive relief.

With regard to the as-applied claims, the District Court held they were unripe because the record did not reflect DOD ever made a final decision with respect to Flynt's request. *Id.* at 102. Furthermore, Flynt would suffer no concrete hardship by delaying review. *Id.* at 103. Also citing the absence of a final decision, the District Court held Flynt had not suffered a concrete injury-in-fact and, thus, had no standing to press the as-applied claims. *Id.*

Turning to the facial challenges, the District Court held that Flynt had both constitutional and prudential standing. *Id.* at 104. The Court stated that because the DOD had already crystallized its policies in Enclosure 3, the "posture of these particular claims ma[de] it inappropriate to dismiss on prudential ripeness grounds." *Id.* at 105. The District Court also held that dismissal on political question grounds was inappropriate because Flynt's claims did not "implicate the President's activities as Commander in Chief or the authority of the Secretary of Defense to direct military actions," nor did they require a court to apply principles beyond normal judicial competence. *Id.* at 107. The District Court did, however, refuse to exercise its discretion under the Declaratory Judgment Act to consider Flynt's facial claims. *Id.* Citing the considerable discretion the Declaratory Judgment Act gives to district courts, the court relied on the absence of a concrete controversy and the uncertainty surrounding Flynt's constitutional claims in withholding declaratory relief. *Id.* at 109-10. The court further refused to grant injunctive relief. *Id.* This appeal followed.

II. Analysis

This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Empagran S.A. v. F. Hoffman-LaRoche, LTD.*, 315 F.3d 338, 343 (D.C. Cir. 2003). In our review, we assume the truth of the allegations made and construe them favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). We review the District Court's decision to withhold declaratory relief for an abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

A. Appellants' Claims

As a threshold matter, it is important to clarify the right appellants seek to protect. In candor, it is not at all clear from appellants' complaint below or briefs in this court precisely what right they believe was violated or contend the courts should vindicate. After some pressing, at oral argument it became clear that they claimed a right, protected under the First Amendment, in their own words, to "go[ ] in [to battle] with the military." This right is different from merely a right to cover war. The Government has no rule-at least so far as Flynt has made known to us-that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DOD rule.

With that distinction made, appellants' claim comes more sharply into focus. They claim that the Constitution guarantees to the media-specifically *Hustler*'s correspondent-the right to travel *with* military units into combat, with all of the accommodations and protections that entails-essentially what is currently known as "embedding."

Indeed, at oral argument appellants' counsel stated that the military is "obligated to *accommodate* the press because the press is what informs the electorate as to what our government is doing in war."

B. Ripeness and Standing

We first consider appellees' contention that appellants lack standing to assert their "as applied" claims and that those claims were not ripe. For the reasons set forth below, we conclude that appellants do have standing and that the claims are ripe.

Standing requires that plaintiffs allege "an injury in fact" that is "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal punctuation omitted). In applying that test, we assume the validity of appellants' allegation of injury, although having crossed that threshold, we may ultimately determine it to be invalid. With that assumption, we hold that appellants do have standing to assert their as-applied claims. They asked for immediate access to accompany U.S. troops in combat, which they contend is their constitutional right, and that access was not granted. Therefore, appellants "ha[ve] suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000). They have standing to challenge the Directive as it was applied in this case.

In order to test the ripeness and justiciability of the claims, we again assume that they are otherwise valid. Ripeness analysis tests whether a question has sufficiently matured to be amenable to adjudication. The Supreme Court has explained that when considering whether an issue is ripe for judicial review, a court must "evaluate both the

fitness of the issues for judicial decision and the hardship to the parties" of refusing a decision. *Texas v. United States*, 523 U.S. 296, 301 (1998) (internal quotation marks and citation omitted). Further, a claim is unripe if it depends on "contingent future events." *Id.* at 300.

Appellants' claim is that credentialed press persons have an immediate right, upon request, to accompany U.S. troops in combat. So understood, the as-applied claims are ripe. Flynt requested that *Hustler* reporters gain access to combat operations, and that access was not immediately granted. Instead, access of another sort was provided-that of covering "the [air] strikes, witness[ing] the humanitarian drops and interview[ing]" soldiers. Flynt's claim does not depend on "contingent future events." He asked for immediate access, which he contends is his constitutional right, and that access was not granted. On these facts, the question is presented in a concrete factual setting and is fit for judicial review.

C. Facial Challenge

With all of appellants' claims properly before us, we now turn to their validity. Because it is clear to us that appellants have asserted no cognizable First Amendment claim, both the as-applied and facial challenges fail.

The facial challenge is premised on the assertion that there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions. There is nothing we have found in the Constitution, American history, or our case law to support this claim.

To support the position that there is such a constitutional right, appellants first point to cases that discuss the general purposes underlying the First Amendment. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("[t]he press was protected so that it could bare the secrets of government and inform the people.") (Black, J., concurring); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (the First Amendment supports the "free discussion of governmental affairs."). These cases, however, say nothing about media access to the U.S. combat units engaged in battle.

Appellants also cite cases that allow facial challenges to statutes or regulations that vest public officials with unfettered discretion to grant or deny licenses to engage in expressive activity, such as *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). This is not, however, a "license" decision. This appeal challenges regulations controlling *access* to government information and activity, not governmental limitation of expression. The Supreme Court has noted the difference. *See, e.g., Los Angeles Police Dept. v. United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999) (distinguishing government limits on access to information in its possession from a government restriction on disseminating information one already possesses).

Likewise, this Court has held that "freedom of speech [and] of the press do not create any per se right of access to government ... activities simply because such access might lead to more thorough or better reporting." *JB Pictures, Inc. v. Dep't of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996). Appellants admit they face a "dearth of case law concerning press access to battles." From this unenviable position, they ask us to look to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), for guidance.

In *Richmond Newspapers*, a plurality of the Supreme Court held that a constitutional right of public access to criminal trials existed based on a long history of such access in the United States and in England at the time our organic laws were created. *Id.* at 581. According to appellants, *Richmond Newspapers* established that the First Amendment may be interpreted to provide for a right of access to government operations, and that access is not limited to criminal trials. They assert that we must apply a *Richmond Newspapers* analysis to the facts of this case. We disagree.

In *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 2004 WL 46645 (Jan. 12, 2004), we held that there was no First Amendment right for plaintiffs to receive the identities of INS detainees and material witnesses who were detained in the wake of the September 11 attacks. Indeed, we made it clear that "[n]either the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Id.* at 934. For emphasis, we added that "neither this Court nor the Supreme Court has ever *indicated* that it would" do so. *Id* (emphasis in original). Instead, we noted that in all areas other than criminal proceedings, the Supreme Court has applied the general rule of *Houchins v. KQED*, 438 U.S. 1 (1978) (plurality opinion), not the exception of *Richmond Newspapers*. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935. *Houchins* held that the press have no First Amendment right of access to prisons, and in doing so stated that the First Amendment does not "mandate[ ] a right of access to government information or sources of information within the government's control." *Houchins*, 438 U.S. at 15. To summarize, neither this Court nor the Supreme Court has ever applied *Richmond Newspapers* outside the context of criminal proceedings, and we will not do so today.

Appellants argue that we did, however, use the *analysis* underlying the *Richmond Newspaper* decision in *JB Pictures Inc. v. Department of Defense*, 86 F.3d 236, 240 (D.C. Cir. 1996). In that case, several media and veterans organizations challenged a Department of Defense policy. That policy shifted ceremonies for deceased service members arriving from overseas from Dover Air Force base to locations closer to the service members' homes. It also gave the families of deceased military personnel the authority to limit press access to those ceremonies. Contrary to appellants' assertion, the extent of our *Richmond Newspapers* discussion in that case is contained in one sentence: "[i]t is obvious that military bases do not share the tradition of openness on which the Court relied in striking down restrictions on access to criminal court proceedings in ... *Richmond Newspapers*." *Id.* Thus *J.B. Pictures* not only does not support wholesale adoption of a *Richmond Newspapers* analysis in every case involving requests for access to government activities or information, it rejects such a rule.

Even if we were to apply a *Richmond Newspapers* test, which again, we do not, it would not support appellants' facial challenge to the Directive. As an initial matter, the history of press access to military units is not remotely as extensive as public access to criminal trials. Without going into great historic detail, it is sufficient that in *Richmond Newspapers* the Supreme Court relied on the "unbroken, uncontradicted history" of public access to criminal trials. *Id.* at 573. This includes the time when "our organic laws were adopted." *Id.* at 569. Indeed, even since "the ancient town meeting form of trial," the "people retained a 'right of visitation' which enabled them to satisfy themselves that justice was in fact being done." *Id.* at 572 (internal citations omitted).

No comparable history exists to support a right of media access to U.S. military units in combat. The very article cited by appellants for the proposition that media have traditionally had broad access to soldiers in combat does not support this position. *See* John E. Smith, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 Colum. J.L. & Soc. Probs. 291, 292-305 (1993). Beginning with the American Revolution, war reporting was primarily in the form of private letters from soldiers and official reports that were sent home and published in newspapers. *Id.* at 293. Indeed, the rise of the professional war correspondent did not begin until at least the time of the Civil War. *Id.* In addition, it is not entirely clear that in any of our early wars the media was actively embedded into units, which is the right appellants seek. In sum, even if we were to attempt a *Richmond Newspapers* analysis and consider the historical foundations of a right of media access to combat units, appellants' claim would fail miserably.

Even if *Richmond Newspapers* applied in this context, and even if there was a historical basis for media access to troops in combat, the Directive would still not violate the First Amendment. *Richmond Newspapers* expressly stated that "[j]ust as a government may impose reasonable time, place, and manner restrictions" in granting access to public streets, "so may a trial judge ... impose reasonable limitations on access to a trial." 448 U.S. at 581 n.18. These limitations could be based on the need to maintain a "quiet and orderly setting," or "courtrooms' ... limited capacity." *Id.* The Directive appellants challenge is incredibly supportive of media access to the military with only a few limitations. The Directive begins with the command that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." DOD Directive 5122.5 ¶ E3.1.1. It further orders military public affairs officers to "act as liaisons, but [ ] not [to] interfere with the reporting

process." *Id.* at ¶ E3.1.6. Additionally, "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." *Id.* at ¶ E3.1.7. The restrictions contained in the Directive are few, including: special operations restrictions; limited restrictions on media communications owing to electromagnetic operational security concerns; use of media pools when the sheer size of interested media is unworkable, such as at the beginning of an operation; and expulsion for members of the media who violate the ground rules. *Id.* at ¶ ¶ E3.1.2.-E3.1.8. Appellants have offered no reason to conclude that these restrictions are unreasonable. Even if *Richmond Newspapers* did apply, appellants' argument would fail.

The District Court, therefore, was more than correct when it stated that declaring the Directive unconstitutional would entail announcing an uncertain, yet "significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism." *Flynt v. Rumsfeld,* 245 F.Supp. 2d at 108. In no way did the District Court abuse its discretion in refusing to grant declaratory relief.

D. As-applied Challenges

We now turn to the as-applied challenges. As explained above, the constitutional right appellants assert does not exist, so the as-applied claim could only survive if this other- wise constitutional Directive was applied to them in some unconstitutional way. It was not. At no time has Flynt ever claimed that he, or *Hustler,* was treated differently under the Directive than any other media outlet. Nor has he claimed that the Directive is some sort of a sham that was not followed.

Even if there were some underlying constitutional right of media access to U.S. troops in battle, the Directive, and its application to appellants in this case, certainly would not have violated it. When Flynt made his request, Clarke explained that "the highly dangerous and unique nature of [special operations] work makes it very difficult to embed media" with ground troops, but also said that there had been "extensive" media access to other aspects of military operations. Specifically, "[s]cores of reporters and photographers have covered the [air] strikes, witnessed humanitarian drops and inter- viewed dozens of [soldiers]." Clarke then provided Flynt with contact information for the Fifth Fleet Public Affairs Officer so that *Hustler* could have similar access. The explanation was clear and consistent with the Directive, which states that "[s]pecial operations restrictions may limit access in some cases." Directive 5122.5 ¶ E3.1.5. Indeed, in conformity with the letter and spirit of the Directive, Clarke not only explained why direct access to ground troops was not currently possible, but she also immediately gave Flynt the information necessary to receive the access that was avail- able. It was Flynt who failed initially to contact the designated public affairs officer. Ultimately, Flynt's reporter was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Qaeda operatives.

At oral argument, appellants asserted that DOD waited too long in making a final decision, and that they should have been required to promptly tell him that "this is a special forces operation, and you can't go." According to appellants, if this were the case, "at least there would be an answer and [we would have been] denied." This is, of course, precisely what happened. Within 16 days of Flynt's initial request, DOD responded by informing him that only special operations were underway. They also, however, advised him that access would be expanding in the future and that substantial access was already available. They

provided him with the necessary contact information to ensure that his *Hustler* reporter would be there with other media representatives. All of this occurred within 90 days of the September 11 attacks. In sum, there is nothing in the record that shows the otherwise constitutional Directive was applied to appellants in any illegal manner.

III. Conclusion

Because we hold that there is no constitutionally based right for the media to embed with U.S. military forces in combat, and because we further hold that the Directive was not applied to Flynt or *Hustler* magazine in any unconstitutional manner, the District Court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5075

September Term, 2003
01cv02399

Filed On: Feb. 3, 2004

Larry Flynt and L.F.P., Inc.,
Appellants

v.

Donald H. Rumsfeld, In his official capacity as
Secretary of Defense and Department of Defense,
Appellees

[ENTERED: FEBRUARY 3, 2004]

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001-2066

Mark J. Langer
Clerk

General Information
(202) 216-7000

February 3, 2004

Dear Counsel,

Enclosed is a copy of the opinion issued this date.

Please note that the judgment has been entered on the same date as the opinion and a copy of the judgment will be sent to you when the mandate issues.

Enclosure

DISTRIBUTION:
All Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY FLYNT
and
LFP, INC.,

Plaintiffs,

v.

DONALD H. RUMSFELD,
Secretary of Defense, and
UNITED STATES DEPARTMENT
OF DEFENSE,

Defendants.

Civil Action No. 01-2399 (PLF)

[ENTERED: FEBRUARY 14, 2003]

OPINION

This matter is before the Court for consideration of defendants' motion to dismiss plaintiffs' amended complaint or, in the alternative, for summary judgment. Plaintiffs previously moved for a preliminary injunction against Secretary of Defense Donald H. Rumsfeld and the United States Department of Defense, alleging that defendants were restraining their First Amendment right to have Hustler Magazine correspondents accompany American troops in combat on the ground in Afghanistan; the Court denied plaintiffs' motion. See Flynt v.Rumsfeld, 180 F. Supp.2d 174 (D.D.C. 2002) ("Flynt I"). After full

briefing, the Court heard argument on defendants' motion to dismiss the amended complaint on May 8, 2002. Upon consideration of the arguments of the parties in their papers and in court, the Court grants defendants' motion to dismiss.

I. BACKGROUND

A. *Plaintiffs' Request for Access*

Plaintiffs contend that defendants have refused and continue to refuse to allow them access to the battlefield to report on the activities of U.S. troops engaged in ground combat in Afghanistan, in violation of their First Amendment right. On October 30, 2001, plaintiffs wrote a letter to Assistant Secretary of Defense Victoria Clarke asking that "Hustler correspondents be allowed to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism." Amended Complaint, Ex. A, October 30, 2001, Letter from Larry Flynt to Assistant Secretary Victoria Clarke ("Letter of Oct. 30, 2001") at 2. After receiving no response from defendants, plaintiffs sent a second letter requesting the identical access. See Amended Complaint, Ex. B., November 12, 2001, Letter from Larry Flynt to Assistant Secretary Victoria Clarke ("Letter of Nov. 12, 2001"). On November 15, 2001, defendants transmitted a fax to plaintiffs in response to the two letters, in which Assistant Secretary Clark stated that defendants already had provided "extensive access to military operations thus far in the war on terrorism," including press coverage of air strikes, humanitarian relief and interviews with U.S. troops serving in the region. See Amended Complaint, Ex. C, November 15, 2001, Fax from Assistant Secretary Victoria Clarke to Larry Flynt ("Fax of November 15, 2001" or "Fax"). She also explained that:

> A particular challenge right now is that the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity. The highly dangerous and unique nature of their work makes it very difficult to embed media. We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities.

Id. Assistant Secretary Clarke provided plaintiffs with the contact information for Commander Jeff Alderson, the commander in the region who was coordinating media requests. Id. At the time of the hearing on the motion for preliminary injunction, plaintiffs had not contacted Commander Alderson to make arrangements for sending a correspondent to the region.

After the Court denied plaintiffs' request for a preliminary injunction but before plaintiffs filed the amended complaint, plaintiffs wrote Assistant Secretary Clarke another letter, again requesting access to actual battlefield combat activities subject to "any such regulations reasonably deemed necessary to advance military operational security in a material way." Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mot."), Ex. A, January 15, 2002, Letter from Larry Flynt to Assistant Secretary Victoria Clarke ("Letter of Jan. 15, 2002") at 2. In this letter, plaintiffs stated that they had not contacted Commander Alderson as suggested in the Fax of November 15, 2001 because they had not requested the type of access defendants had indicated was available. Rather, plaintiffs asserted, they "specifically requested reporter access to actual battlefield combat activities," and specifically renewed their request to have a reporter "accompany ground troops in order to cover actual combat activity carried out in connection with the current military

campaign known as Operation Enduring Freedom." Id. In response to this letter and a follow-up letter plaintiffs sent on January 30, 2002, defendants reiterated their position that they are willing to provide "extensive access to [U.S.] operations" and that the Hustler correspondent just needs to "work with our people on the ground." Defs.' Mot., Ex. C, February 4, 2002, Letter from Assistant Secretary Victoria Clarke to Larry Flynt ("Letter of Feb. 4, 2002"). With this letter, defendants sent plaintiffs a two-page list of public affairs contacts in the military in connection with Operation Enduring Freedom, with telephone numbers and email addresses, so that plaintiffs could arrange for access to U.S. troops. See id.

Several weeks later, responding to an email requesting access to U.S. ground troops engaged in combat operations, Lt. Colonel Bonnie Hébert emailed Roger Wilcox, plaintiffs' counsel, to obtain additional details about plaintiffs' request. See Supplemental Memorandum in Support of Defendants' Motion to Dismiss ("Defs.' Supp. Mem."), Ex. A, February 22, 2002, Email from Lt. Colonel Bonnie Hébert to Roger Wilcox ("Email of Feb. 22, 2002"). On March 2, 2002, Sergeant Aaron Lawrence emailed Mr. Wilcox setting forth some options for placing a reporter in Afghanistan, which included details on the locations at which a reporter would be most likely to have the opportunity to embed with combat soldiers. See Defs.' Supp. Mem., Ex. B, March 2, 2002, Email from Sergeant Aaron Lawrence to Roger Wilcox ("Email of March 2, 2002").

On March 8, 2002, David Buchbinder, a correspondent reporting on the conflict in Afghanistan for Hustler, emailed Sergeant Lawrence explaining that he wanted to stay with soldiers stationed at military bases in Afghanistan and accompany troops on combat missions. See Defs.' Supp. Mem., Ex. C, March 8, 2002, Email from David

Buchbinder to Sergeant Aaron Lawrence ("Email of March 8, 2002"). Mr. Buchbinder also requested additional contact information for military media liaisons on the ground in Afghanistan. See id. Defendants provided this contact information to plaintiffs in a letter from Lt. Colonel Hébert to Allen MacDonell of LFP, Inc. and again indicated the likely location of combat troops with which Mr. Buchbinder could embed. See Defs.' Supp. Mem., Ex. D, March 15, 2002, Letter from Lt. Colonel Bonnie Hébert to Allen MacDonell ("Letter of March 15, 2002").

On May 7, 2002 Mr. Buchbinder filed an affidavit in this action stating that he was in Afghanistan on Bragram Air Base, and had placed himself on the requisite waiting list for journalists requesting access to conventional combat missions. See Plaintiff's Motion for Leave to File Supplemental Affidavit of David Buchbinder in Support of Their Response to Defendants' Supplemental Memorandum in Support of Defendants' Motion to Dismiss, Ex. A, Declaration of David Buchbinder ("Buchbinder Aff.") ¶¶ 1, 12. Mr. Buchbinder also stated that he had made a request to the appropriate authority to accompany special forces operations, and had been informed by Major Bryan Hilferty that Defense Department officials were awaiting approval from the United States to allow reporters to accompany special forces on missions. See id. ¶¶ 24, 35. If the Defense Department received approval, Major Hilferty informed Mr. Buchbinder, the major would consult the same waiting list created for journalists wishing to embed with conventional combat troops, on which Mr. Buchbinder currently was listed, in order to determine which reporters would accompany special forces on their missions. See id. ¶ 37. At the time of his affidavit, Mr. Buchbinder had not accompanied soldiers on any missions, although he had received word from defendants that specific efforts were being made to place him with ground troops and that his placement on the list was rising. See id. ¶¶ 40-46.

B. *Department of Defense Directive 5122.5*

Defendants announced the Defense Department's policy on media access in Department of Defense Directive Number 5122.5. See Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Defs.' PI Mem."), Ex. B, Department of Defense Directive 5122.5 (Sept. 27, 2000). The Directive confers on the Assistant Secretary of Defense for Public Affairs the responsibility of ensuring "a free flow of news and information to the news media [and] the general public, . . . limited only by national security constraints" and outlines the Assistant Secretary's responsibilities, functions and authority. Id. ¶¶ 3.2, 1. Enclosures 2 and 3 to the Directive "delineate principles that guide the Department regarding public access to information and media coverage of DoD activities." Id. ¶ 3.2.

Enclosure 2 is entitled "Principles of Information." Enclosure 3, entitled "Statement of DoD Principles for News Media," affirms that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." See Defs.' PI Mem., Ex. B, Department of Defense Directive 5122.5, Enclosure 3, Statement of DoD Principle for News Media ("Enclosure 3") ¶ E3.1.1. Under conditions of open coverage, "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." See id. ¶ E.3.1.7. While media pools may be used, in which "a limited number of news media [represent] a larger number of news media organizations for news gatherings and sharing of material during a specified activity," they "are not to serve as the standard means of covering U.S. military operations." See id. ¶ E3.1.2. Journalists "in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations." See id. ¶ 3.1.4. Journalists

"shall be provided access to all major military units," but "[s]pecial operations restrictions may limit access in some cases." See id. ¶ E.3.1.5. News organizations "shall make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations." See id. ¶ E.3.1.4.

At the heart of this action lies plaintiffs' charge that Department of Defense Directive 5122.5 and Enclosure 3 in particular violate a First Amendment right – or a "qualified First Amendment right" – of media access to the battlefield. Plaintiffs' claims fall into two distinct categories: (1) claims charging that defendants violated plaintiffs' First Amendment right while operating under Enclosure 3 by improperly denying a Hustler correspondent the right to accompany combat forces on the ground in Afghanistan (the "as-applied" claims); and (2) claims asserting that Enclosure 3 is facially unconstitutional under the First and Fifth Amendments (the "facial challenge" claims).

II. DISCUSSION

A. Motion to Dismiss

A motion to dismiss should not be granted unless plaintiffs can demonstrate no set of facts that supports their claim entitling them to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1117 (D.C. Cir. 2000). In evaluating the motion to dismiss, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiffs. See Harris v. Ladner, 127 F.3d 1121, 1123 (D.C. Cir. 1997). While the complaint is to be construed liberally, the Court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept the plaintiffs' legal conclusions. See National Treasury

Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996); Kowal v. MCI Communication Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

Although a district court may dispose of a motion to dismiss on the basis of the complaint alone, a court may consider materials beyond the pleadings when evaluating a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. "[W]here necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed fact plus the court's resolution of disputed facts." Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). This Court has interpreted Herbert to allow a court to "consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." Scolaro v. D.C. Bd. of Elections and Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (Kennedy, J.) (citing Herbert v. National Academy of Sciences, 974 F.2d at 197), *aff'd* Scolaro v. D.C. Bd. of Elections and Ethics, No. 00-7176, 2001 U.S. App. LEXIS 2747, at *1 (D.C. Cir. Jan. 18, 2001); see also Ass'n of Merger Dealers, LLC v. Tosco Corp., 167 F. Supp. 2d 65, 69 (D.D.C. 2001) (Hogan, C.J.) (same); Rann v. Chao, 154 F. Supp. 2d 61, 64 (D.D.C. 2001) (Urbina, J.) (same).[1]

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[1] In this case, both plaintiffs and defendants have filed affidavits, correspondence and other supplemental materials that contain largely undisputed facts. The Court finds it helpful and productive to consider these materials in analyzing the jurisdictional issues presented.

B. *Plaintiffs' As-Applied Claims*

In their Amended Complaint, plaintiffs assert that a First Amendment right of press access exists and that defendants violated that right when they denied plaintiffs' request for access to the battlefield in Afghanistan. See Amended Complaint, Claims 1-3, 8-9, and those portions of Claims 4-7 that allege that defendants applied Enclosure 3 in denying plaintiffs' request for access. In response, defendants argue that the Court lacks subject matter jurisdiction to consider the as-applied claims because the claims are unripe and because plaintiffs lack standing to bring suit. They also urge the Court to defer to the Executive Branch under the political question doctrine. Defendants then assert that the Amended Complaint fails to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court finds it unnecessary to consider whether the as-applied claims are viable and thus survive a Rule 12(b)(6) motion, because the Court agrees with defendants that it does not have jurisdiction to consider these claims.

1. Ripeness

The ripeness doctrine "limits the power of federal courts in adjudicating disputes. Its roots are found in both the Article III requirement of 'case or controversy' and prudential considerations favoring the orderly conduct of the administrative and judicial processes." State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986). To meet the Article III requirements of ripeness in the context of a challenge to an administrative action, a plaintiff must demonstrate both (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). In evaluating such a challenge, a court must consider whether judicial intervention would

inappropriately interfere with further administrative action, whether the court would benefit from further factual development of the issues, and whether delayed review would cause hardship to the plaintiffs. See Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d 43, 48-49 (D.C. Cir. 1999) (quoting Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998)). Sometimes the issue presented is a purely legal question, allowing for decision without the need for additional development of the factual record, but the case generally is not fit for review if the agency has not made a final decision on the matter before it. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d at 479. The ripeness doctrine prevents the courts through premature adjudication "from entangling themselves in abstract disagreements over administrative policies," and it "protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. at 148-49.

Plaintiffs assert that their as-applied claims are ripe because defendants denied their request to place a Hustler correspondent with combat forces on the battlefield in Afghanistan. Specifically, plaintiffs allege that defendants' failure to grant their request to allow a Hustler correspondent to accompany American soldiers in battle, demonstrated by the Fax of November 15, 2001, constituted a denial of plaintiffs' request. See Amended Complaint ¶ 80. The Court concludes, however, that plaintiffs' as-applied claims are not fit for judicial decision at this juncture because defendants have not made a final decision with respect to plaintiffs' request for access to combat ground forces in battle. Further development of the facts is necessary to prevent the Court from issuing an advisory opinion on the claims plaintiffs raise.

Certainly plaintiffs are correct that the Fax of Nov. 15, 2001 did not explicitly grant them access to ground troops on combat missions in Afghanistan. The absence of an explicit grant of access, however, did not constitute a denial of access sufficient to serve as a final agency decision ripe for judicial review. The Fax of Nov. 15, 2001 informed plaintiffs that access to ground forces was not available at that time because the only troops on the ground were special operations forces, whose activities made it difficult for defendants to embed journalists with them. See Fax of Nov. 15, 2001 at 2.[2] Defendants did not comply with plaintiffs' specific request for access to ground troops because such access was not available in the Afghan theater at that time, not because defendants had determined that plaintiffs should not be granted that access. See id. The Fax also informed plaintiffs that defendants were exploring various options and were hopeful that facilitation of access to some aspect of special forces activities would take place. See id.

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[2] Plaintiffs make assertions in their briefs that combat ground forces operations were taking place at the time of plaintiffs' first request in October 2001. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Pls.' Mem.") at 4, 21. The Amended Complaint and subsequent factual filings by plaintiffs, however, do not contain any allegations of such troop movement at that time. In addition, plaintiffs do not challenge defendants' claim that special operations forces were unavailable for embedment at the time of plaintiffs' initial requests.

The record before the Court reflects no final decision with respect to plaintiffs' request for access to ground troops at the time of the Fax of November 15, 2001. Instead, it reflects the shifting scenery of the Afghan theater and the status of Defense Department attempts to place media in the area. As Commander Alderson explained in his December 10, 2001 declaration: "The military situation in and around Afghanistan has been a rapidly changing, fluid environment and so the support for press coverage has passed through several phases." Defs.' PI Mem, Ex. E, Declaration of William Jeffrey Alderson ¶ 3. By May of 2002, when Hustler's David Buchbinder executed his affidavit, defendants still had not denied plaintiffs the access they sought. Indeed, Mr. Buchbinder was on a list with other journalists eligible to accompany troops and his placement on the list was rising. Buchbinder Aff. ¶¶ 37, 42, 43. Absent a final agency decision denying plaintiffs' request for access, plaintiffs' as-applied claims based on this alleged denial are unfit for adjudication.

The Court also rejects plaintiffs' argument that a ripe case or controversy exists now because the parties disagree as to whether there is a First Amendment right of media access to the battlefield and because plaintiffs' initial request for access was specifically access pursuant to the First Amendment. See Plaintiffs' Memorandum in Response to Defendants' Supplemental Memorandum in Support of Defendants' Motion to Dismiss ("Pls.' Supp. Mem.") at 2. Even if defendants provide access, plaintiffs argue, they will do so without acknowledging that a First Amendment right to media access to the battlefield exists, thereby effectively denying plaintiffs' precise request. See id. Plaintiffs' effort to parse their argument in order to craft a ripe as applied claim falls short. The mere existence of a legal disagreement about the scope of the First Amendment does not make that disagreement fit for judicial review. See id. at 149. Courts do not function to provide advisory opinions ungrounded in

the rights of an injured party. See Abbott Laboratories v. Gardner, 387 U.S. at 148-49. If plaintiffs are granted access to combat forces, there will no denial of access and therefore no claim based on that denial for the Court to adjudicate.

Nor will plaintiffs suffer any hardship by this Court's declining to consider their as-applied claims now. As discussed above, the Court has concluded that plaintiffs have not adequately alleged that defendants have in fact denied them access to the battlefield. Furthermore, plaintiffs' subsequent efforts to secure access to combat ground forces even as they sought relief before the Court demonstrate that the issues are in flux and that plaintiff has not yet been harmed by an agency decision. The correspondence exchanged between plaintiffs and defendants after plaintiffs filed their Amended Complaint reveals that plaintiffs are continuing their effort to gain access to combat troops through military channels that very well may result in access. Indeed, as of May 7, 2002, Mr. Buchbinder was in line to accompany conventional forces on a combat mission and had received word from defendants that specific efforts were being made to place him with British forces in the interim. See Buchbinder Aff. ¶¶ 40-45. The record before the Court thus demonstrates that it is possible if not probable that Mr. Buchbinder will be granted access to combat ground forces. In these circumstances, any theoretical hardship to plaintiffs caused by defendants' delay in reaching a final decision does not outweigh the Court's and defendants' interest in postponing review. See Louisiana Environmental Action Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (quoting State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d at 479-80) (If a court "confronts an institutional reason why it should not review a petitioner's claim at that time, the court should reject the claim as not ripe unless 'postponing review .... imposes a

hardship on the complaining party that is immediate, direct, and significant'.").[3]

2. Standing

Defendants also assert that plaintiffs lack Article III standing to bring their as applied claims before the Court. To meet the Article III requirements of standing, a plaintiff must show: (1) that it has suffered an injury in fact, the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Mudd v. White, 309 F.3d 819, 823 (D.C. Cir. 2002); Gettman v. DEA, 290 F.3d 430, 433 (D.C. Cir. 2002). The alleged injury in fact must be concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative. See Lujan v. Defenders of Wildlife, 504 U.S. at 560-561; Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002); American Petroleum Institute v. EPA, 216 F.3d 50, 63 (D.C. Cir. 2000). The standing inquiry is particularly rigorous when a court is considering the asserted unconstitutionality of actions taken by another branch of the government. See Raines v. Byrd,

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[3] Although the Court concludes that the issue of media access is not yet ripe, in part because plaintiffs have not demonstrated that defendants denied plaintiffs' request for access to ground forces, this decision by no means allows defendants to obfuscate or prolong their decision-making in order to keep plaintiffs' claims from ultimate resolution by a court. If there were a showing that defendants were taking no steps to deal with plaintiffs' requests or had acted arbitrarily or had treated these plaintiffs differently from other members of the media, a different result might pertain.

521 U.S. 811, 819 (1997). If plaintiff cannot meet all three prongs of the standing test, then the Court must dismiss the suit for lack of constitutional standing.

Plaintiffs assert that "[d]efendants' refusal to grant the requested permission to cover the activities of American soldiers on the ground in Afghanistan constitutes a denial of Plaintiff's request" and that such denial caused injury to plaintiffs. Amended Complaint ¶ 80. As the Court concluded in its analysis of ripeness, however, plaintiffs have not adequately shown that defendants have in fact denied plaintiffs' request for access to ground forces in combat in Afghanistan. Thus, they cannot demonstrate that they have suffered an injury in fact as a result of such a denial, the first prong of the standing test. The Court therefore concludes that plaintiffs lack standing to bring their as-applied claims.

C. *Plaintiffs' Facial Challenge Claims*

In Claims 4 through 7 of the Amended Complaint, plaintiffs assert that Enclosure 3 to Department of Defense Directive 5122.5 is facially invalid under the First and Fifth Amendments to the Constitution because it: (1) fails "to acknowledge and protect Plaintiffs' fundamental right of access to overt combat activities of American troops, as guaranteed by the First Amendment" (Amended Complaint, Claim 4, ¶ 117); (2) does not contain "definite and objective standards for use in determining Plaintiffs' request for press access," thereby providing defendants "unfettered discretion" to deny press access requests by Plaintiffs for "any reason or for no reason," or for "arbitrary, capricious or discriminatory reasons" (id., Claim 5, ¶¶ 122-124); (3) does not require defendants to issue a decision on plaintiffs' press access request "within a constitutionally permissible period of time," thereby allowing the "suppression of Plaintiffs' First Amendment rights by

official inaction or delay on their request" (id., Claim 6, ¶¶ 130, 132); and (4) does not provide for "prompt administrative appeal of Defendants' denial of Plaintiffs' request for access" in violation of plaintiffs' First and Fifth Amendment rights (id., Claim 7, ¶¶ 137-138).

Defendants move to dismiss plaintiffs' facial challenges to Enclosure 3 on four grounds, the first three of which may be considered jurisdictional in nature under Rule 12(b)(1) of the Federal Rules of Civil Procedure. First, defendants move to dismiss the claims under the prudential aspects of the ripeness doctrine. Second, defendants argue that the facial challenge claims are non-justiciable under the political question doctrine. Third, they urge the Court (if it otherwise finds jurisdiction over the facial challenge claims) to exercise its discretion by declining to apply the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Finally, defendants move to dismiss Claims 4-7 for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In view of its decision on the jurisdictional arguments, the Court does not reach this last point.

1. Prudential Ripeness

In mounting their facial challenge to Enclosure 3, plaintiffs assert that the enclosure "acts as a licensing requirement which imposes a requirement that plaintiffs obtain permission from defendants before exercising their First Amendment right to gather news on the battle field." Pls.' Mem. at 43. They rely on the decision of the Supreme Court in City of Lakewood v. Plain Dealer Publishing Co., in which the court held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S.

750, 755-756 (1988). Recognizing that plaintiffs may be correct that they do not have to allege that defendants actually applied Enclosure 3 in order to assert a facial challenge under this theory, defendants nevertheless seek dismissal under prudential ripeness considerations.[4]

The Supreme Court and the courts of appeals have extended both the ripeness and standing doctrines beyond a strict Article III constitutional analysis to ensure that the prudential policies underlying the doctrines properly are protected. See Wyoming Outdoor Council v. United States Forest Service, 165 F.3d at 48 (even where the constitutional requisites for standing or ripeness are present, a party may still lack standing or a case may not be ripe for adjudication "under 'prudential' principles."). Prudential considerations serve to restrain courts "from hastily intervening into matters that may be best viewed at another time or another setting, especially when the uncertain nature of an issue might affect a court's ability to decide intelligently." Id. at 50 (quoting Louisiana Environmental Action Network v. Browner, 87 F.3d at 1382) (internal quotation omitted). "Like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal jurisdiction' are 'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" Mudd v. White, 309 F.3d at 823 (quoting Bennett v. Spear, 520 U.S. 154, 162 (1997)). To determine if prudential considerations dictate dismissal, a court must analyze the interests of the parties through essentially the same lenses as it does when

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[4] Defendants concede that plaintiffs' facial challenge claims by their nature are more likely to withstand a ripeness challenge. See Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mem.") at 35.

examining constitutional ripeness, balancing "the petitioner's interest in prompt consideration of the allegedly unlawful agency decision against the agency's interest in crystallizing its policy before that policy is subjected to judicial review[,] and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." Eagle-Pitcher Industries v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985); see also Wyoming Outdoor Council v. United States Forest Service, 165 F.3d at 48-49.

In the context of plaintiffs' particular facial challenge to Enclosure 3, two of the traditional factors used to evaluate ripeness are inapposite, or weigh in favor of adjudication. Plaintiffs' interest in prompt consideration of the agency decision is predetermined, and the Department of Defense already has crystallized its policies as evidenced in Enclosure 3. See Eagle Pitcher Industries v. EPA, 759 F.2d at 915. As for the third factor, while the Court may have a significant interest in postponing adjudication of plaintiffs' facial challenge claims, see National Treasury Employees Union v. United States, 101 F.3d at 1431 ("[i]f we do not decide it now, we may never have to") and *supra* at 12-13, the posture of these particular claims make it inappropriate to dismiss on prudential ripeness grounds.

2. The Political Question Doctrine

Defendants next argue that plaintiffs' facial challenge claims raise non-justiciable political questions, the examination of which should be left to the Executive Branch consistent with powers designated to the President under

Article II, Section 2 of the Constitution.[5] The political question doctrine exists to remove certain political questions from judicial scrutiny, "because [political questions] invite courts to intrude into the province of coordinate branches of government, [and] because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature." U.S. ex rel Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C. Cir. 1981). Defendants assert that plaintiffs' challenges to the formulation of guidelines for processing media requests for access to the battlefield should be left to the Executive Branch, and that any judicial examination of such guidelines would improperly infringe on the President's constitutional mandate as Commander in Chief. Defendants also assert that consideration of Claims 4-7 involve questions the judiciary does not have the expertise to resolve. See Defs.' Mem. at 15-16.

In evaluating defendants' argument, the Court must consider (1) whether the issues involve "resolution of questions committed by the text of the Constitution to a coordinate branch of Government," (2) whether resolution of the questions presented would demand that the Court "move beyond areas of judicial expertise," and (3) whether "prudential considerations counsel against judicial intervention." Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). See also Antolok v. United States, 873 F.2d 369, 380-382 (D.C. Cir. 1989) (analyzing political question doctrine in context of foreign relations). In answering these

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[5] Article II, Section 2, Clause 1 states that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual service of the United States." U.S. CONST. art. II, § 2, cl. 1.

questions in a case that closely parallels this action, Judge Sand declined to find that the issues presented were non-justiciable under the political question doctrine. See Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991). In that case, as here, plaintiffs alleged that the Department of Defense had improperly denied plaintiffs access to media pools in the Persian Gulf in violation of a First Amendment media right of access to the battlefield and, more broadly, that the guidelines the Defense Department used in determining pool access infringed on this alleged protected right of access. The defendants asserted that the issue was non-justiciable in light of the deference usually accorded to military decisions. Id. at 1566.

Acknowledging that a court does not have the power to review tactical military decisions the examination of which could jeopardize covert military operations, Judge Sand nevertheless found that the regulations at issue "do not represent a fact-specific tactical or strategic decision, but rather are 'blanket' regulations which apply with equal force to access to battlefields where overt actions are in progress." Nation Magazine v. Department of Defense, 762 F. Supp. at 1566. In contrast to those cases in which the Supreme Court had found that the political question doctrine removed from the purview of the courts challenges to certain military decisions, Judge Sand determined that the plaintiffs' claims did not raise a challenge "to this country's military establishment, its goals, directives or tactics." Id. at 1567. As such, the President's Article II powers as Commander in Chief "are not implicated because resolution of the question does not impact upon the internal functioning and operation of the military." Id. In addition, the examination of media access guidelines does not "interfere with United States relations with a foreign power in as much as it concerns examination of the management of American press covering United States military operations. See id. Judge Sand concluded that the constitutional protections underlying the

plaintiffs' claim - First Amendment freedoms and Fifth Amendment equal protection - are clearly subjects the judiciary is competent to consider. See id.

As in the case before Judge Sand, the defendants here misconstrue plaintiffs' facial challenge claims when they argue that decisions regarding media access necessarily challenge the manner in which the military operates during battle and when they suggest that the Court would have to evaluate defendants' exercise of their discretion under the broad obligations to defend the country and command military forces. See Defs.' Mem. at 17.[6] Defendants also are wrong when they assert that plaintiffs' claims go directly to the heart of the military's "goals, directives and tactics" by challenging defendants' determinations as to who may enter a combat zone or accompany U.S. troops into battle. See id. at 17, n. 6. In their facial challenge claims plaintiffs do not ask the Court to delve into tactical decisions made by defendants. They ask the Court only to consider whether a First Amendment right of media access to the battlefield exists - a right they themselves characterize as a "qualified right of access" subject to reasonable Executive Branch regulations - and, if so, to direct defendants to enact guidelines that comport with such First Amendment protections; plaintiffs maintain that the current guidelines

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[6] As an initial matter, defendants incorrectly characterize the regulations at issue in Nation Magazine as barring the press from an entire geographic area. Apparently, defendants make this argument in an attempt to distinguish the guidelines at issue there from the instant circumstances in which Enclosure 3 addresses individualized entry into the military theater. See Defs.' Mem.. at 17, n.6. Like plaintiffs in this case, however, the plaintiffs in Nation Magazine challenged regulations that concerned individual journalists' access to the battlefield.

do not. Such questions neither directly implicate the President's activities as Commander in Chief or the authority of the Secretary of Defense to direct military actions, nor do they require the Court to range beyond the limits of normal judicial competence. To decide this case, the Court need only "apply normal principles of interpretation to the constitutional provisions at issue." Goldwater v. Carter, 444 U.S. at 999 (Powell, J., concurring); see Nation Magazine v. Department of Defense, 762 F. Supp. at 1567 ("The historic competence of the federal judiciary to address questions of First Amendment freedoms and equal protection is clear.").[7]

Having determined that plaintiffs' claims should not be dismissed as prudentially unripe or as non-justiciable, the Court concludes that it has jurisdiction to hear plaintiffs' facial challenge claims. This does not necessarily result, however, in adjudication of plaintiffs' claims on the merits at this time.

3. Declaratory Relief

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), is an "enabling" act that confers discretion on a court "rather than an absolute right upon the litigant." Wilton v. Seven

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[7] The Court's consideration of plaintiffs' First Amendment claims could, of course, be conducted with appropriate deference to the expertise of the Department of Defense, where such deference is warranted. See e.g., Stillman v. Department of Defense, 209 F. Supp. 2d 185, 204 (D.D.C. 2002) (in rejecting claim that review of government decision determining access to classified documents is non-justiciable, court concluded that it has the ability to adjudicate intertwined First Amendment issue without impinging on Executive Branch discretion and expertise).

Falls Co., 515 U.S. 277, 287 (1995). Emphasizing the discretionary nature of the Act, the Supreme Court in Wilton held that district courts may decline to exercise their discretion to entertain an action "even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Id. at 282; see also Mittleman v. United States Dep't of the Treasury, 919 F. Supp. 461, 470 (D.D.C. 1995). "When all is said and done, . . . 'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.'" Wilton v. Seven Falls Co., 515 U.S. at 282 (quoting Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243 (1952)). As a result, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." Id. at 288.

In deciding whether to exercise its discretion under the Declaratory Judgment Act, it is worthwhile for the Court to examine the path it would have to take in assessing the merits of plaintiffs' facial challenge claims. First, the Court would have to determine whether plaintiffs' analogy to licensing requirements in the current context is appropriate, or instead is an unwarranted extension of Supreme Court precedent. The policy behind allowing facial challenges to licensing statutes is that such laws impose prior restraints on speech, making it unlikely for "as-applied" claims ever to ripen, and very likely that the regulators' discretionary decisions are effectively unreviewable. In City of Lakewood v. Plain Dealer Publishing Co., the seminal facial challenge decision, the Supreme Court identified "two major First Amendment risks" inherent in waiting: "self censorship by speakers in order to avoid being denied a license to speak; and the difficulty in effectively detecting, reviewing and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." See

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. at 759. The Supreme Court made clear that a facial challenge claim may be raised only where the challenged law or regulation has a close nexus to expressive activities. See id. at 759. Here, plaintiffs ask the Court to expand the scope of recognized facial challenge claims based on prior restraint of speech in the domestic licensing context to entertain a challenge to a statutory scheme that allegedly infringes on free press rights of access to battlefields in time of combat. See Pls.' Mem. at 43. This is not an uncontroversial extension of the facial challenge doctrine.

Second, if the Court ultimately were persuaded by plaintiffs to extend the law of the First Amendment prior restraint licensing doctrine to permit facial challenges to include press access protections, the Court necessarily would have to determine whether there is in fact a First Amendment right of access to the battlefield. As it noted in Flynt I, the Court agrees that there may be a limited or qualified right of media access to the battlefield. See Flynt v. Rumsfeld, 180 F. Supp.2d at 175-76; see also Nation Magazine v. Dep't of Defense, 762 F. Supp. at 1572. The Court is hesitant, however, to announce such a significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism, unmoored to a case or controversy in the traditional sense. See Flynt v. Rumsfeld, 180 F. Supp. at 176 ("The specific parameters of this First Amendment 'qualified right of access' . . . would depend upon the particular circumstances presented."). The Supreme Court's direction to consider declaratory relief through the lense of "wise judicial administration" cautions against taking such a bold step in the current posture of this case. See Wilton v. Seven Falls Co., 515 U.S. at 288.

Once again, Judge Sand's analysis in Nation Magazine is instructive. In that action certain claims had become moot by the time Judge Sand issued his decision, and only facial challenges claims remained "eligible" for declaratory relief. See Nation Magazine v. Department of Defense, 762 F. Supp. at 1570, n.11.[8] Although Judge Sand opined that there was a limited right of media access to the battlefield, he nevertheless concluded that it was inadvisable to decide the merits of the claim in the context of a declaratory judgment action raising only facial challenges:

> In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access. Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards. [. . .] Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation. Accordingly, the Court declines to exercise its power to grant plaintiffs' request for declaratory relief on their right of access claim.

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[8] The Court notes that Judge Sand did not discuss his implicit extension of the facial challenge doctrine based on prior restraint cases to the different context of press access claims.

Nation Magazine v. Department of Defense, 762 F. Supp. at 1572 (citing Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 575-585 (1947)). See also Texas v. United States, 523 U.S. 296, 301 (1998) ("[t]he operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, '[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'") (internal citation omitted).

Judge Bates recently expressed a similar caution against premature declaration of rights in the context of military decisions concerning press access to the battlefield. In Getty Images News Services, Corp. v. Department of Defense, 193 F. Supp. 2d 112, 113 (D.D.C. 2002), the plaintiff, a reputable press organization, raised First Amendment and equal protection challenges to its alleged exclusion by the Department of Defense from the National Media Pool and regional media pools created by the Defense Department in Afghanistan covering Operation Enduring Freedom. After finding that plaintiff lacked standing to raise its claims because the Defense Department admitted the plaintiff to the National Media Pool after suit was filed and because the regional pools in Afghanistan had been discontinued, see id. at 116-17, Judge Bates concluded that plaintiff's request for a declaratory judgment that the Defense Department had violated its constitutional rights did not save plaintiff's claim. In the absence of an existing or anticipated regional pool, plaintiff's claim "was no longer part of a controversy of sufficient immediacy and reality to warrant declaratory relief." Id. at 117, n.7 (internal quotations and citations omitted). Judge Bates also concluded that to the extent that plaintiff sought an injunction with respect to "regional pools outside of Afghanistan that may be established in the future," or "future military restrictions in which DOD may

restrict access without establishing a pool," the claim was "entirely too speculative to provide a basis for relief under both standing and ripeness analyses." See id. at 117. He emphasized that "the absence of a concrete controversy is of particular concern in light of the important constitutional issues at stake and the national defense interests that might be implicated." See id. at 118.[9]

For these reasons, the Court concludes that the more prudent course is to delay resolution of these constitutional issues until and unless plaintiffs are denied access after having pursued their request through normal military channels. But see note 3, *supra*. The Court therefore declines to exercise its discretion to consider the declaratory relief plaintiffs seek in connection with their facial challenge claims.

4. Injunctive Relief

In the Amended Complaint, plaintiffs request "an order pursuant to Fed. R. Civ. Proc. 65 restraining Defendants from utilizing the current Department of Defense guidelines in determining Plaintiffs' application for press access to the battlefields of Operation Enduring Freedom, including overt combat operations." See Amended Complaint at 29-30, ¶ H. For prudential reasons similar to those discussed above, the Court declines

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[9] The court of appeals has expressed similar hesitation in the context of a constitutional claim of first impression in the First Amendment context. See Penthouse International, Ltd. v. Meese, 939 F.2d 1011, 1020 (D.C. Cir. 1991) (a court should refrain from exercising its equitable powers under the Declaratory Judgment Act "where the court can avoid the premature adjudication of constitutional issues"; a court should instead "wait to decide the issue until it is squarely presented.").

plaintiffs' request for a permanent injunction. For the reasons well expressed by Judge Bates, prudence dictates that the Court refrain from exercising its power to grant injunctive relief as much as it does with respect to declaratory relief until a genuine case or controversy is presented "of sufficient immediacy and reality." Getty Images News Services Corp. v. Department of Defense, 193 F. Supp. 2d at 117, n. 7.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss plaintiffs' amended complaint is granted. An Order consistent with this Opinion shall issue this same day.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 2/14/03

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY FLYNT
and
LFP, INC.,

Plaintiffs,

v.

DONALD H. RUMSFELD,
Secretary of Defense, and
UNITED STATES DEPARTMENT
OF DEFENSE,

Defendants.

Civil Action No. 01-2399 (PLF)

[ENTERED: FEBRUARY 14, 2003]

ORDER AND JUDGMENT

This came before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment. For the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that defendants' motion to dismiss [20-1] is GRANTED; it is

FURTHER ORDERED that JUDGMENT is entered for defendants; it is

FURTHER ORDERED that this case is DISMISSED from the docket of this Court; and it is

FURTHER ORDERED that this Order and Judgment shall constitute a FINAL JUDGMENT in this case. This is a final appealable order. See Rule 4(a), Fed. R. App. P..

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 2/14/03

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5075

September Term, 2003
01cv02399

Filed On: April 7, 2004
[814503]

Larry Flynt and L.F.P., Inc.,
Appellants

v.

Donald H. Rumsfeld, In his official capacity as Secretary of Defense and Department of Defense,
Appellees

BEFORE: Edwards, Sentelle, and Henderson, Circuit Judges

[ENTERED: APRIL 7, 2004]

ORDER

Upon Consideration of appellants' petition for rehearing filed March 19, 2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Nancy G. Dunn
Deputy Clerk

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

E3. ENCLOSURE 3

STATEMENT OF DoD PRINCIPLES FOR NEWS MEDIA

E3.1.1. Open and independent reporting shall be the principal means of coverage of U.S. military operations.

E3.1.2. Media pools (limited number of news media who represent a larger number of news media organizations for news gatherings and sharing of material during a specified activity), are not to serve as the standard means of covering U.S. military operations. However, they sometimes may provide the only means of early access to a military operation. In this case, media pools should be as large as possible and disbanded at the earliest opportunity (in 24 to 36 hours, when possible). The arrival of early-access media pools shall not cancel the principle of independent coverage for journalists already in the area.

E3.1.3. Even under conditions of open coverage, pools may be applicable for specific events, such as those at extremely remote locations or where space is limited.

E3.1.4. Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations shall make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.

E3.1.5. Journalists shall be provided access to all major military units. Special operations restrictions may limit access in some cases.

E3.1.6. Military PA officers should act as liaisons, but should not interfere with the reporting process.

E3.1.7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible. The military shall be responsible for the transportation of pools.

E3.1.8. Consistent with its capabilities, the military shall supply PA officers with facilities to enable timely, secure, compatible transmission of pool material and shall make those facilities available, when possible, for filing independent coverage. If Government facilities are unavailable, journalists, as always, shall file by any other means available. The military shall not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

E3.1.9. Those principles in paragraph E3.1.8.,above, shall apply as well to the operations of the standing DoD National Media Pool system.

Fed. R. Civ. P. 12 (b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:01-cv-02399

FLYNT, et al v. RUMSFELD, et al
Assigned to: Judge Paul L. Friedman
Demand: $0
Lead Docket: None
Case in other court: None
Cause: 28:1331 Fed. Question: Violation 5th & 8th Amendme

Date Filed: 11/16/01
Jury Demand: None
Nature of Suit: 440
Civil Rights: Other
Jurisdiction: U.S. Government Defendant

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Filing Date	#	Docket Text
11/16/2001	1	COMPLAINT filed by plaintiff LARRY FLYNT, plaintiff LFP, INC.; exhibits (A-C) (aet) (Entered: 11/20/2001)
11/16/2001		SUMMONS NOT ISSUED. (aet) (Entered: 11/20/2001)
11/26/2001	2	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC. for Paul J. Cambria, Jr. to appear pro hac vice (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA LLP, 42 Delaware Avenue, Suite 300, Buffalo, New

		York 14202,); affidavit (1) (td) Modified on 11/27/2001 (Entered: 11/27/2001)
11/26/2001	3	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC. for Roger W. Wilcox, Jr. to appear pro hac vice (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA LLP, 42 Delaware Ave, Suite 300, Buffalo, New York 14202,); affidavit (1) (td) Modified on 11/27/2001 (Entered: 11/27/2001)
11/26/2001	4	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC. for preliminary injunction, and for hearing; exhibits (8) (td) (Entered: 11/27/2001)
11/27/2001		SUMMONS (4) issued to federal party(s) federal defendant DONALD H. RUMSFELD, federal defendant DOD, and non-parties: U.S. Attorney and U.S. Attorney General. (td) (Entered: 11/27/2001)
12/04/2001	5	MOTION filed by federal defendant DONALD H. RUMSFELD, federal defendant DOD to extend time to (td) (Entered: 12/06/2001)
12/10/2001	6	MEMORANDUM by federal

		defendant DONALD H. RUMSFELD, federal defendant DOD in opposition to motion for preliminary injunction [4-1]; attachments (5) (td) (Entered: 12/11/2001)
12/12/2001	7	RETURN OF SERVICE/ AFFIDAVIT of summons and complaint executed upon U.S. Attorney on 11/28/01 (td) (Entered: 12/13/2001)
12/12/2001	8	RETURN OF SERVICE/ AFFIDAVIT of summons and complaint executed upon U.S. Attorney General on 11/28/01 (td) (Entered: 12/13/2001)
12/12/2001	9	RETURN OF SERVICE/ AFFIDAVIT of summons and complaint executed on 11/29/01 upon federal defendant DONALD H. RUMSFELD (td) (Entered: 12/13/2001)
12/12/2001	10	RETURN OF SERVICE/ AFFIDAVIT of summons and complaint executed on 11/29/01 upon federal defendant DOD (td) (Entered: 12/13/2001)
12/17/2001	11	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC. for leave

		to file reply to defendants' memorandum in opposition to plaintiffs' motion for preliminary injunction; EXHIBIT (Reply) (td) (Entered: 12/18/2001)
12/21/2001	12	ORDER by Judge Paul L. Friedman: motion for preliminary injunction hearing set for 2:00 1/4/02; each side will be allotted 40 minutes for argument including rebuttal (N) (bm) (Entered: 12/21/2001)
12/21/2001	13	ORDER by Judge Paul L. Friedman: granting motion for Roger W. Wilcox, Jr. to appear pro hac vice (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA LLP, 42 Ave, Suite 300, Buffalo, New York 14202,) [3-1] by LFP, INC., LARRY FLYNT, granting motion for Paul J. Cambria, Jr. to appear pro hac vice (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA LLP, 42 Delaware Avenue, Suite 300, Buffalo, New York 14202,) [2-1] by LFP, INC., LARRY FLYNT (N) (bm) (Entered: 12/21/2001)
12/21/2001	14	ORDER by Judge Paul L. Friedman: granting motion for leave to file reply to defendants' memorandum in opposition to plaintiffs' motion

		for preliminary injunction [11-1] by LFP, INC., LARRY FLYNT (N) (bm) (Entered: 12/21/2001)
12/21/2001	35	REPLY by plaintiff LARRY FLYNT, plaintiff LFP, INC. to motion for preliminary injunction [4-1] by LFP, INC., LARRY FLYNT (tb) (Entered: 07/09/2002)
01/04/2002		MOTION HEARING before Judge Paul L. Friedman taken under advisement by LFP, INC., LARRY FLYNT motion for injunction [4-1]; parties to submit a briefing schedule after resolution of motion for preliminary injunction. Reporter: Santa Zizzo (bm) (Entered: 01/04/2002)
01/08/2002	15	MEMORANDUM OPINION AND ORDER by Judge Paul L. Friedman: denying motion for preliminary injunction [4-1] by LFP, INC., LARRY FLYNT; encouraging the parties to agree on an expedited briefing and argument schedule for consideration of the defendants' motion to dismiss or for summary judgment. (N) (bm) (Entered: 01/08/2002)
01/24/2002	16	AMENDED COMPLAINT by plaintiff LARRY FLYNT, plaintiff

		LFP, INC. amending complaint [1-1]; exhibits (4); (FIAT. Judge Friedman) (td) (Entered: 01/28/2002)
01/25/2002	17	MOTION filed by federal defendant DONALD H. RUMSFELD, federal defendant DOD for scheduling order regarding response to amended complaint. (td) (Entered: 01/28/2002)
01/28/2002	18	RETURN OF SERVICE/ AFFIDAVIT of summons and complaint executed on 1/17/02 by serving John R. Griffiths at DOJ. (td) (Entered: 01/29/2002)
02/05/2002	19	ORDER by Judge Paul L. Friedman: granting motion for scheduling order regarding response to amended complaint [17-1] by DOD, DONALD H. RUMSFELD; defendants shall file their motion to dismiss, or, alternatively, for summary judgment due 2/7/02; plaintiffs shall file their response to dispositive motions due 2/27/02; defendants shall file their reply to dispositive motions due 3/8/02; motion hearing set for 2:00 3/28/02 (N) (bm) (Entered: 02/05/2002)
02/07/2002	20	MOTION filed by federal defendant

		DONALD H. RUMSFELD, federal defendant DOD to dismiss amended complaint complaint [16-1], or, in the alternative, for summary judgment; attachments (3) (td) (Entered: 02/08/2002)
02/26/2002	21	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC., federal defendant DONALD H. RUMSFELD, federal defendant DOD seeking to modify scheduling order. (td) (Entered: 02/27/2002)
03/01/2002	22	ORDER by Judge Paul L. Friedman: granting motion seeking to modify scheduling order [21-1] by DOD, DONALD H. RUMSFELD, LFP, INC., LARRY FLYNT; plaintiffs shall file their response to dispositive motion due 3/1/02; defendants' reply to dispositive motion due 3/12/02 (N) (bm) (Entered: 03/01/2002)
03/01/2002	23	MEMORANDUM by plaintiff LARRY FLYNT, plaintiff LFP, INC. in opposition to motion to dismiss [16-1] [20-1] or in the alternative for summary judgment [20-2] by DOD, DONALD H. RUMSFELD (td) (Entered: 03/05/2002)
03/12/2002	24	REPLY by federal defendant

		DONALD H. RUMSFELD, federal defendant DOD in support of motion to dismiss [16-1] [20-1] or, in the alternative, for summary judgment [20-2]; attachment (1) (td) Modified on 03/15/2002 (Entered: 03/15/2002)
03/21/2002	25	ORDER by Judge Paul L. Friedman: cancelling the motion hearing set for 2:00 on 3/28/02 and rescheduling to 2:00 4/26/02 (N) (bm) (Entered: 03/21/2002)
04/16/2002	26	ORDER by Judge Richard W. Roberts: cancelling the motion hearing set for 2:00 4/26/02 and rescheduling to 10:00 4/30/02 (N) (bm) (Entered: 04/16/2002)
04/17/2002	27	MOTION filed by federal defendant DONALD H. RUMSFELD, federal defendant DOD for leave to file supplemental memorandum in support of motion to dismiss; EXHIBIT (supplemental memo) (td) (Entered: 04/18/2002)
04/19/2002	28	ORDER by Judge Paul L. Friedman: granting motion for leave to file supplemental memorandum in support of motion to dismiss by 4/25/02 [27-1] by DOD, DONALD

		H. RUMSFELD (N) (bm) (Entered: 04/19/2002)
04/19/2002	37	SUPPLEMENTALMEMORANDUM by federal defendant DONALD H. RUMSFELD, federal defendant DOD in support of motion to dismiss amended complaint [16-1] [20-1]; attachments (6) (td) (Entered: 08/07/2002)
04/23/2002	29	ORDER by Judge Paul L. Friedman: cancelling the motion hearing set for 10:00 4/30/02 and rescheduling to 11:00 5/8/02; each side is allotted 30 minutes for argument including rebuttal. (N) (bm) (Entered: 04/23/2002)
04/25/2002	30	RESPONSE by plaintiff LARRY FLYNT, plaintiff LFP, INC. to defendants' supplemental memorandum in suppor to defendants' motion to dismiss. (td) (Entered: 04/29/2002)
05/07/2002	32	MOTION filed by plaintiff LARRY FLYNT, plaintiff LFP, INC. for leave to file supplemental affidavit of David Buchbinder in support of their response to defendants' supplemental memorandum in support of defendants' motion to dimsiss; EXHIBIT (Supplemental

		Affidavit) (td) Modified on 05/09/2002 (Entered: 05/09/2002)
05/08/2002		MOTION HEARING before Judge Paul L. Friedman taken under advisement by DOD, DONALD H. RUMSFELD motion to dismiss amended complaint [16-1] [20-1], taken under advisement by DOD, DONALD H. RUMSFELD motion for summary judgment [20-2] Reporter: Santa Zizzo (bm) (Entered: 05/08/2002)
05/08/2002	31	ORDER by Judge Paul L. Friedman: granting plaintiffs' motion for leave to file the supplemental affidavit of David Buchbinder in support of their response to motion to dismiss; accepting the accompanying affidavit of David Buchbinder for filing. (N) (bm) (Entered: 05/08/2002)
05/08/2002	36	DECLARATION by plaintiff LARRY FLYNT, plaintiff LFP, INC. of David Buchbinder. (td) (Entered: 08/07/2002)
05/20/2002	33	AFFIDAVIT of David Buchbinder. (td) (Entered: 05/20/2002)
06/03/2002	34	ERRATA by federal defendant DONALD H. RUMSFELD, federal

		defendant DOD notice of filing of second declaration of Major Leanne Sumllen. (td) (Entered: 06/07/2002)
08/07/2002	38	MEMORANDUM by federal defendant DONALD H. RUMSFELD, federal defendant DOD in opposition to plaintiff's letter requesting discovery. (td) (Entered: 08/08/2002)
08/20/2002	40	MEMORANDUM by plaintiff LARRY FLYNT, plaintiff LFP, INC. concerning limited discovery request: (copy) (td) (Entered: 10/06/2002)
08/29/2002	39	ORDER by Judge Paul L. Friedman: denying plaintiff's motion for permission to submit a proposed limited discovery schedule. (N) (bm) (Entered: 08/29/2002)
11/15/2002	41	MOTION filed by plaintiffs for issuance of a decision on defendants' motion to dismiss the amended complaint (cdw) (Entered: 11/20/2002)
11/26/2002	42	RESPONSE by federal defendan: DONALD H. RUMSFELD, federal defendant DOD to plaintiffs' motion for issuance of a decision on defendants' motion to dismiss the

		amended complaint [41-1]. (td) (Entered: 11/27/2002)
01/09/2003	43	MOTION filed by plaintiffs requesting scheduling of status conference (mpt) (Entered: 01/10/2003)
02/10/2003	44	ORDER by Judge Paul L. Friedman: denying motion requesting scheduling of status conference [43-1] by LFP, INC., LARRY FLYNT (N) (bm) (Entered: 02/10/2003)
02/14/2003	45	OPINION by Judge Paul L. Friedman (N) (jwd) (Entered: 02/14/2003)
02/14/2003	46	ORDER AND JUDGMENT by Judge Paul L. Friedman: granting motion to dismiss amended complaint complaint [16-1] [20-1] by DOD, DONALD H. RUMSFELD; entering judgment for defendants; this order and judgment shall constitute a Final Judgment in this case. This is a final appealable order. See Rule 4(a),Fed.R.App.P. (N) (jwd) (Entered: 02/14/2003)
02/28/2003	47	NOTICE OF APPEAL by plaintiff LARRY FLYNT, plaintiff LFP, INC. from order [46-1], entered on: 2/14/03. $105.00 fee paid; copy

		mailed to parties. (td) (Entered: 03/11/2003)
03/11/2003		TRANSMITTED PRELIMINARY RECORD on appeal [47-1] by LFP, INC., LARRY FLYNT to U.S. Court of Appeals (td) (Entered: 03/11/2003)
03/13/2003		USCA # 03-5075 assigned for appeal [47-1] by LFP, INC., LARRY FLYNT (td) (Entered: 03/14/2003)
04/15/2003	48	TRANSCRIPT filed for date of 1/4/02 preliminary injunction Reporter: Santa Zizzo (bm) (Entered: 04/17/2003)

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT
and
L.F.P., INC.,

Plaintiffs,

v. CASE NUMBER 1:01cv02399 (PLF)

DONALD H. RUMSFELD
In his official capacity as Secretary of Defense,
and
DEPARTMENT OF DEFENSE,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Larry Flynt and L.F.P., Inc., plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 14th day of February, 2003, and from all decisions and orders brought up for review upon appeal from said judgment.

DATED: Buffalo, New York
February 26, 2003

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA, LLP

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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT
9211 Robin Drive
Los Angeles, California 90069

and

LFP, INC.
8484 Wilshire Boulevard, Suite 900
Beverly Hills, California 90211,

Plaintiffs,

v. CASE NUMBER

DONALD H. RUMSFELD
In his official capacity as
Secretary of Defense,
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

and

DEPARTMENT OF DEFENSE
1000 Defense Pentagon
Washington, DC 20301-1000

Defendants.

COMPLAINT FOR DECLARATORY RELIEF,
PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION

Comes now the Plaintiffs, by and through their attorneys, and complain of the Defendants as follows:

I. INTRODUCTION

1. In this civil action, Plaintiffs seek a judgment pursuant to Fed. R. Civ. Proc. 57 and 28 U.S.C. §2201 declaring that Defendants' denial of access by Plaintiffs to American military personnel, particularly ground forces, involved in "Operation Enduring Freedom" in Afghanistan and elsewhere in Central and Southern Asia constitutes a violation of the freedoms guaranteed to the press by the First Amendment of the United States Constitution and a deprivation of due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

2. Plaintiffs also seek a preliminary injunction pursuant to Fed. R. Civ. Proc. 65, pending the final determination of this action, enjoining Defendants from preventing or interfering with Plaintiffs' efforts to have its correspondents gather information in person on the activities on American military personnel, particularly ground forces, acting in furtherance of Operation Enduring Freedom in Afghanistan and wherever else United States military forces are committed to action in the current war against terrorism.

II. JURISDICTION AND VENUE

3. Jurisdiction in this case in based on 28 U.S.C. §1331 and the Constitution of the United States. Further, 28 U.S.C. §2201 authorizes this Court to grant the requested declaratory relief.

4. Pursuant to 28 U.S.C. §1391(e), venue is proper because Defendants reside in this district and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

III. THE PARTIES

5. Plaintiff Larry Flynt, resides in California and is a publisher.

6. Plaintiff LFP, Inc. is a California corporation which publishes *inter alia*, Hustler magazine.

7. Defendant Donald H. Rumsfeld is Secretary of the United States Department of Defense. In that capacity, Secretary Rumsfeld exercises authority, direction and control over the Department of Defense.

8. The Department of Defense is an agency of the Executive Branch of the federal government and is charged with the responsibility of conducting military affairs under the authority of the President of the United States.

IV. FACTUAL BACKGROUND

9. On the morning of September 11, 2001, two commercial airline jets collided with and destroyed the World Trade Center Towers in New York City, killing more than 4,000 people.

10. That same morning, another commercial airliner crashed into the Pentagon in Washington, DC, killing approximately 189 members of the military services, civilians and airline passengers.

11. Also on September 11, 2001, a commercial airline jet crashed in Pennsylvania, killing 45 people.

12. Upon information and belief, federal authorities investigating these tragic incidents have concluded that they were the result of coordinated terrorist attacks.

13. In an address to a joint session of Congress on September 20, 2001, President George W. Bush announced that the evidence gathered during the course of law enforcement investigations into the afore-mentioned terrorist incidents pointed to "a collection of loosely affiliated terrorist organizations known as al Qaeda."

14. In that same address to the joint session of Congress, President Bush demanded that the Taliban regime controlling most of the country of Afghanistan comply with certain demands, including the closing of every terrorist training camp and the surrender of all terrorists within Afghanistan.

15. On October 7, 2001, President Bush addressed the nation to announce that the United States military had begun to undertake military actions against al Qaeda terrorist training camps and the military installations of the Taliban regime in Afghanistan. He announced that the name of this military operation is Enduring Freedom.

16. Operation Enduring Freedom continues through this date.

17. Upon information and belief, Operation Enduring Freedom currently involves the activities of various United States armed forces, particularly in the areas of Central and Southern Asia, including the countries of Afghanistan and Uzbekistan.

18. Upon information and belief, Operation Enduring Freedom involves components of the United States Army, Navy, Air Force and Marines.

19. Upon information and belief, the source of which is various media reports and statements made by Department of Defense and military officials, the United

States has American military personnel currently conducting operations on the ground in Afghanistan.

20. Upon information and belief, the source of which is a transcript of remarks made by Secretary of Defense Rumsfeld to correspondents on November 11, 2001, American ground forces have been in Afghanistan for some time at a number of different locations. These American forces have been, among other things, acting as liaisons with Northern Alliance forces opposing the Taliban regime, coordinating military resupply efforts, and providing targeting information to United States air warfare assets.

21. Upon information and belief, the source of which is a transcript of a press briefing given by Secretary of Defense Rumsfeld on November 13, 2001, a number of American special forces units are in Afghanistan assisting forces opposing the Taliban regime.

22. Upon information and belief, the source of which is the aforementioned November 13, 2001 press briefing transcript, United States special operation forces are also working against Taliban forces in Southern Afghanistan.

23. Upon information and belief, American soldiers will be used to open and secure a "land bridge" to Uzbekistan and to repair airports in Afghanistan, all for the purpose of assisting the distribution of humanitarian aid in Afghanistan.

24. The presence of United States military forces in Afghanistan and surrounding countries is a topic of great national concern, particularly in light of the tragic events of September 11, 2001.

25. The actions of United States military personnel within Afghanistan are a topic of national interest and debate.

26. In particular, the actions of American soldiers on the ground in Afghanistan are of great interest and concern to American citizens.

27. The First Amendment of the United States Constitution protects and guarantees the right of the press to gather and publish news to the American public.

28. The First Amendment of the United States Constitution guarantees and protects the right of the press to gather information concerning United States military activities and to report news of such activities to the American public.

29. Larry Flynt and LFP, Inc., as publisher of Hustler magazine, engage in the constitutionally protected activity of gathering and disseminating news to the American public.

30. Hustler magazine was founded by Larry Flynt in 1974 and currently has a readership of approximately one million.

31. Hustler magazine has an interest in providing its readership with news about American military activities in Afghanistan and wherever else Operation Enduring Freedom requires the commitment of United States military forces.

32. Hustler magazine has been at the journalistic forefront on issues concerning the Taliban regime and terrorism.

33. In January 1996, Hustler magazine published an article on terrorism entitled "Killer Chemicals: Terrorists' new tools."

34. Long before the recent tragic terrorist events in the United States, Hustler magazine published an article on Islamic extremists entitled "The New Crusade: Islam's Holy War against the world."

35. On the topic of the Taliban regime's involvement in the opium trade, Hustler magazine published "Heroin for Allah: Fanatical Muslims Push Opium Between Prayers" in December 1999.

36. An article entitled "Terrorism: A Survival Guide" is planned to run in the February 2002 issue of Hustler magazine.

37. Hustler magazine has not come lately to these important current issues of national debate for the American public.

38. Plaintiffs Larry Flynt and LFP, Inc. seek to continue reporting to the American public on issues related to America's campaign against terrorism.

39. In furtherance of its desire to report news concerning Operation Enduring Freedom to its readership, on October 30, 2001, Larry Flynt sent a letter on behalf of LFP, Inc., to Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs (see Flynt letter attached as Exhibit A).

40. Assistant Secretary of Defense Clarke was appointed by President George W. Bush on April 5, 2001 and is responsible for all matters relating to Department of Defense public information.

41. Pursuant to Department of Defense Directive 5122.5, issued September 27, 2000, the Assistant Secretary of Defense for Public Affairs is the principal staff assistant and advisor to the Secretary and the Deputy Secretary of Defense for Department of Defense news media relations.

42. In this capacity, the Assistant Secretary of Defense is charged with, among other things, ensuring the free flow of news and information to the news media and evaluating news media requests for Department of Defense support and cooperation.

43. Enclosure 3 to Department of Defense Directive 5122.5 is entitled "Statement Of DoD Principles For News Media."

44. The Department of Defense Statement Of DoD Principles For News Media explains that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations."

45. In Larry Flynt's October 30, 2001 letter to Assistant Secretary of Defense Clarke, Plaintiffs requested that Hustler magazine correspondents be allowed to accompany and report on American ground forces in Afghanistan and wherever else such forces may be utilized in the campaign against terrorism.

46. Further, Plaintiffs also requested that Hustler correspondents be given permission to accompany ground troops on combat missions, and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom.

47. In their October 30, 2001 written request to Assistant Secretary Clarke, Plaintiffs asserted their First Amendment right of access to American military personnel in the battlefield and in combat, but specifically promised to "comply with any reasonable, necessary and narrowly tailored reporting restrictions" intended to advance operational security in a material way.

48. In numerous prior military conflicts, the constitutional right of press access to American soldiers on the battlefield and in combat has been accommodated by United States military authorities, subject to reasonable and necessary security precautions typically related to preserving the secrecy of an operation in advance and limiting the reporting of militarily sensitive operational details during and after the conclusion of a military operation.

49. Plaintiffs have no intention of breaching United States military operational security requirements and will allow United States military authorities to review and revise any information gained during such operations prior to publication in order to ensure operational security.

50. Larry Flynt and LFP, Inc. are as concerned with the preserving of firsthand correspondent accounts of American military activities, particularly on the battlefield, for historical analysis as they are committed to timely and accurate reporting of current events. Consequently, even if military censors limited Hustler correspondents, for example, to reporting only five minutes of an hour's footage or observations of an operation or other military activity, at least the remaining 55 minutes would remain available for reporting to the American public at a time when military operational security would not be jeopardized.

51. Indeed, Plaintiffs' intentions dovetail with the perspectives of high ranking military and Defense Department officials.

52. Upon information and belief, the source of which is a transcript of public remarks made at a working session of the Brookings Institute and the Pentagon on November 8, 2001, Rear Admiral Craig R. Quigley, presently assigned to assist the Assistant Secretary of Defense for Public Affairs, addressed a question concerning operational security and stated, "I've never run into the news organization yet who is looking to put American forces at risk, so that's easy."

53. Upon information and belief, the source of which is the same transcript of the Brookings Institute/Pentagon working session on November 8, 2001, Assistant Secretary of Defense for Public Affairs Victoria Clarke addressed a question concerning press coverage of Army Rangers special operations Activities as follows:

> But to follow up on something that Admiral Quigley was saying and to your question, Kirk, I have very few to no concerns about how the media would handle very sensitive situations. I have complete and total confidence that the correspondents who are covering this war care as much as we do about the men and women in uniform and their safety. Many of you all know them far better than I do. I know for a fact that people do not want to go out of their way and risk operational security of any kind. So I have complete and total confidence that that would be fine. When you can get over some of these issues that we've been talking about,

once they're hooked up I have complete and total confidence the situation will be fine.

54. Having not received a response from Assistant Secretary of Defense Clark, by letter dated November 12, 2001, Larry Flynt renewed LFP, Inc.'s request to the Department of Defense for permission to have Hustler magazine correspondents accompany American ground forces in Afghanistan and report on their actions in this war against terrorism (see November 12, 2001 letter attached as Exhibit B).

55. On November 15, 2001, the Office of the Assistant Secretary of Defense faxed a copy of a letter purportedly written to Larry Flynt by Assistant Secretary of Defense Clarke on November 7, 2001. A copy of this undated letter with facsimile cover sheet is attached as Exhibit C.

56. In this letter, Assistant Secretary Clarke states, "I agree completely a free press, including its coverage of military operations, is critical to upholding one of the fundamental principals upon which this country was founded."

57. Assistant Secretary Clarke also noted in this correspondence that the Department of Defense had facilitated press coverage of strikes, humanitarian drops and interviews of men and women serving "in the region." Assistant Secretary Clarke advised Plaintiff to contact the 5th Fleet Public Affairs Officer if Plaintiffs are interested in similar access.

58. However, as to Plaintiffs' specific request for permission to accompany American soldiers on the ground in Afghanistan and to report news of their activities back to the American public, Assistant Secretary Clarke,

citing the "highly dangerous and unique nature of their work," explained only that, "We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities."

59. Having had Plaintiffs' request for permission to accompany ground troops in Afghanistan and to report news of their activities to the American public under consideration since October 30, 2001, Defendants have yet to permit Plaintiff to cover the activities of American soldiers on the ground in Afghanistan.

60. Further, while Assistant Secretary Clarke cites the "unique nature" of the work of American ground forces in Afghanistan, she does not provide any specific explanation of what is unique about the nature of American ground troop activities in this campaign as opposed to any other prior military conflict the American press has been allowed to cover from a first-hand perspective.

61. Defendants have not explained or demonstrated why the present United States military action on the ground in Afghanistan is any more dangerous or unique than any prior military conflict during which correspondents have been permitted to accompany ground troops and, indeed, the Plaintiffs allege to the contrary.

62. Defendants' failure to grant the requested permission to cover the activities of American soldiers on the ground in Afghanistan constitutes a *de facto* denial of Plaintiffs' request.

63. Upon information and belief, Defendants have handled similar requests for permission for press access to American ground troops in Afghanistan by other media organizations in a similar fashion and, to date, no such coverage has been permitted.

64. By refusing to grant Plaintiffs' October 30, 2001 request for permission to accompany American military personnel on the ground in Afghanistan and elsewhere as part of Operation Enduring Freedom and to report to the American public news of their actions, Defendants have violated and continue to violate Plaintiffs' First Amendment rights.

FIRST CLAIM
(Declaratory Judgment)

65. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 64 of this Complaint as if fully set forth herein.

66. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

67. Defendants have denied Plaintiffs access to information gathering and news reporting forums traditionally open to American journalists in violation of Plaintiffs' rights as guaranteed by the First Amendment to the United States Constitution.

68. Plaintiffs are entitled to a judgment declaring that Defendants have improperly denied Plaintiffs access to information gathering and news reporting forums in violation of Plaintiffs' First Amendment rights.

SECOND CLAIM
(Declaratory Judgment)

69. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 68 of this Complaint as if fully set forth herein.

70. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

71. Defendants' denial of Plaintiffs' request to accompany and report news of the activities of American soldiers on the ground in Afghanistan does not promote a compelling government interest by the least restrictive means.

72. Plaintiffs are entitled to a judgment declaring that Defendants have imposed an unlawful content-based prior restraint depriving Plaintiffs of their fundamental press freedoms as guaranteed by the First Amendment to the United States Constitution.

THIRD CLAIM
(Declaratory Judgment)

73. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 72 of this Complaint as if fully set forth herein.

74. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

75. Defendants' denial of Plaintiffs' request for permission to accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public is not narrowly tailored to further a substantial government interest while leaving open adequate alternative avenues of communication.

76. Plaintiffs are entitled to a judgment declaring that Defendants have imposed an unlawful prior restraint on Plaintiffs in violation of their rights as

guaranteed by the First Amendment to the United States Constitution.

FOURTH CLAIM
(Declaratory Judgment)

77. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 76 of the Complaint as if fully set forth herein.

78. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

79. Defendants' refusal to grant Plaintiffs' request to accompany American soldiers on the ground in Afghanistan and report news of their activities to the American public is arbitrary and capricious and made without reference to specific and objective standards governing determination of such requests.

80. Plaintiffs are entitled to a judgment declaring that Defendants' refusal to grant the requested permission violates their rights to due process as guaranteed by the Fifth Amendment to the United States Constitution.

FIFTH CLAIM
(Preliminary and Permanent Injunction)

81. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 80 of the Complaint as if fully set forth herein.

82. The foregoing circumstances warrant the granting of injunctive relief pursuant to Fed. R. Civ. Proc. 65 to restrain Defendants from violating Plaintiffs' rights under the United States Constitution both preliminarily and

pending the final determination of this action, and permanently thereafter.

83. Upon information and belief, the actions of Defendants as herein described and of those persons acting in concert with them and at their direction have been taken with the express intent and purpose of preventing Plaintiffs from engaging in their reporting and publishing activities, which are protected by the First Amendment to the United States Constitution.

84. Plaintiffs do not have an adequate remedy at law for Defendants' abrogation of their First and Fifth Amendment rights.

85. Plaintiffs have suffered drastic and irreparable harm to their First and Fifth Amendment rights and will continue to suffer such injury if Defendants are not immediately enjoined from prohibiting or interfering with Plaintiffs' efforts to exercise their First Amendment rights to have Hustler magazine correspondents accompany American soldiers on the ground in Afghanistan and report news of their activities to the American public.

86. Plaintiffs are likely to succeed on the merits of their claims.

87. The public interest will be advanced by the issuance of a preliminary injunction.

88. By reason of the foregoing, if not preliminarily enjoined, Defendants will continue to deprive Plaintiffs of their rights under the First and Fifth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs pray that this Court issue:

A. A judgment declaring that Defendants have imposed an unlawful content-based prior restraint depriving Plaintiffs of their fundamental press freedoms as guaranteed by the First Amendment to the United States Constitution and an Order permanently enjoining Defendants from prohibiting or interfering with Plaintiffs' efforts to have Hustler magazine correspondents accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public;

B. A judgment declaring that Defendants have improperly denied Plaintiffs access to information gathering and news reporting forum in violation of Plaintiffs' First Amendment rights and an Order permanently enjoining Defendants from prohibiting or interfering with Plaintiffs' efforts to have Hustler magazine correspondents accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public;

C. A judgment declaring that Defendants' refusal to grant Plaintiffs permission to accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public violates Plaintiffs' rights to due process as guaranteed by the Fifth Amendment to the United States Constitution and an Order permanently enjoining Defendants from prohibiting or interfering with Plaintiffs' efforts to have Hustler magazine correspondents accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public;

D. An order pursuant to Fed. R. Civ. Proc. 65 restraining Defendants from prohibiting or interfering with Plaintiffs' efforts to have Hustler magazine correspondents accompany American soldiers on the ground in Afghanistan and to report news of their activities to the American public,

both preliminarily and pending the final determination of this action, and permanently thereafter.

DATED: November __, 2001

Larry Flynt and
LFP, Inc.

By Their Attorneys,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA, LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.

By /s/ Paul J. Cambria, Jr.
PAUL J. CAMBRIA, JR., ESQ.

Office and Post Office Address
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333
Pending Admission Pro Hac Vice

and

JOHN PERAZICH, ESQ.
Local Counsel and Member of the District of Columbia Bar

By /s/ John Perazich
JOHN PERAZICH
Bar #27144

Office and Post Office Address
1701 Q Street, N.W.
Washington, DC 20009-2455
(202) 986-7500

EXHIBIT A
COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

LFP INC.
Magazine and Media Publishing

October 30, 2001

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

In light of recent tragic events on American soil and the mobilization of United States military personnel in the fight against terrorism, the interest of the American public in its Government's efforts to quell international terror has never been greater. In keeping with its long-standing commitment to reporting on important national and international issues, Hustler magazine plans to cover the American campaign against terrorism extensively. This is a continuation of Hustler magazine's efforts to inform and educate the American public on the realities of terrorism and the involvement of the Taliban in the opium trade (see "Killer Chemicals: Terrorists' New Tools" [January 1996]; "The New Crusade: Islam's Holy War Against The World" [April 1996]; and "Heroin for Allah: Fanatical Muslims Push Opium Between Prayers" [December 1999]). "Terrorism: A Survival Guide" will run in the February 2002 issue. Hustler magazine has been at the forefront of these vital international controversies and intends to continue being in the vanguard of those reporting to America on these crucial issues and events.

A most significant topic of American political and social debate currently is the presence and activities of United States military forces in Southern Asia, most particularly in Afghanistan. These activities have already included the use of American and allied special forces in ground actions within Afghanistan. Further, according to statements by President George W. Bush and Secretary of Defense Donald Rumsfeld, the use of ground forces by the United States and its allies within Afghanistan and, potentially, other areas of Asia and the Middle East can be expected in the future.

The commitment of American and allied ground forces to action in this war against terror is an important topic of great interest to the American public, of which the Hustler magazine readership is a part. Consequently, Hustler magazine has assigned two experienced journalists to report on the battlefield bravery and sacrifices of the men and women in the United States armed forces. As publisher of Hustler magazine and as an American citizen, I ascribe to the belief that a crucial function of the free press guaranteed by the First Amendment is to offer the citizens of this country an informed and independent perspective on the Government's use of military force, wherever it occurs in the world.

Accordingly, on behalf of Hustler magazine, I ask that Hustler correspondents be allowed to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism. I specifically request that Hustler correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom.

This request is in keeping with the American press' historically recognized right of free access to battlefields upon which American men and women are risking their lives to protect and advance the cause of democracy. From the Civil War to the invasion of Normandy in World War II, Korea and the Vietnam War, American journalists have accompanied American troops during combat actions and risked their lives in order to provide accurate and timely information concerning the actions of United States military forces and the progress of United States military campaigns. Press coverage of Operation Enduring Freedom is just as important now as it was during World War II and Vietnam.

While Hustler magazine recognizes the need for operational security and would comply with any reasonable, necessary and narrowly tailored reporting restrictions intended to advance such security in a material way, we believe the right of a free press to battlefield and combat action access is a fundamental guarantee of the First Amendment which can and should be accommodated by United States military officials. Indeed, the military's operational security needs have been met during numerous prior armed conflicts without denying or unreasonably restricting press access to the battlefield. There is no reason why that cannot happen during Operation Enduring Freedom.

Please contact me immediately so that I may know whether the permission I request herein has been granted.

Very truly yours,

/s/ Larry Flynt
Larry Flynt

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT B
COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

LFP INC.
Magazine and Media Publishing

November 12, 2001

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

Two weeks have passed since I wrote to you requesting that two Hustler journalists be allowed to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in the United States campaign against terrorism. I specifically requested that Hustler correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom. As of today, I have received no response from you.

I understand that there are many demands on your time and attention during this crucial point in our history. I also believe that the right of a free press to battlefield and combat action access is a fundamental guarantee of the First Amendment, which can and should be accommodated by United States military officials.

Obtaining permission to provide the American public with first hand battlefield reportage is of great importance to me. Please respond as soon as possible to this second request.

Very truly yours,

Larry C. Flynt
LFP, Inc.

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT C
COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

FAX COVER SHEET

DATE: 11/15/01

TO: Larry Flynt **PHONE:** (323) 651-6400
FAX: (323) 651-0488

FROM: Torie Clarke **PHONE:** (703) 697-9312
FAX: (703) 695-4299

SUBJECT: This is a fax copy of the letter we mailed on 11/7/01.

Number of pages Including cover sheet: 2

8484 Wilshire Boulevard, Suite 900
Beverly Hills, California 90211

Dear Mr. Flynt,

Thank you very much for your recent letter and interest in covering the war on terrorism.

I agree completely a free press, including its coverage of military operations, is critical to upholding one of the fundamental principles upon which this country was founded.

We have facilitated extensive access to military operations thus far in the war on terrorism. Scores of reporters and photographers have covered the strikes, witnessed the humanitarian drops and interviewed dozens of men and women serving in the region. Should your correspondents be interested in similar access, they should contact Commander Jeff Aldarson, the 5th Fleet Public Affairs Officer at 011-973-724-027.

A particular challenge right now is that the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity. The highly dangerous and unique nature of their work makes it very difficult to embed media. We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities.

Please feel free to contact my office again if we can provide more information.

Sincerely,

/s/ Victoria Clarke
Victoria Clarke
Assistant Secretary of Defense
For Public Affairs

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT
9211 Robin Drive
Los Angeles, California 90069

and

LFP, INC.
8484 Wilshire Boulevard, Suite 900
Beverly Hills, California 90211,

Plaintiffs,

v.

CASE NUMBER
1:01-CV-02399(PLF)

DONALD H. RUMSFELD
In his official capacity as
Secretary of Defense,
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

and

DEPARTMENT OF DEFENSE
1000 Defense Pentagon
Washington, DC 20301-1000

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF,
PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION

Comes now the Plaintiffs, by and through their attorneys, and complain of the Defendants as follows:

I. INTRODUCTION

1. This is an Amended Complaint submitted pursuant to Rule 15 of the Federal Rules of Civil Procedure. The original Complaint was filed with this Court on November 16, 2001. Defendants have not yet interposed an answer to Plaintiffs' Complaint.

2. In this civil action, Plaintiffs seek a judgment pursuant to Fed. R. Civ. Proc. 57 and 28 U.S.C. §2201 declaring that Defendants' denial of access by Plaintiffs to American military personnel, particularly ground forces engaged in combat, involved in "Operation Enduring Freedom" in Afghanistan and elsewhere constitutes a violation of the freedoms guaranteed to the press by the First Amendment of the United States Constitution and a deprivation of due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

3. Plaintiffs also seek a preliminary injunction pursuant to Fed. R. Civ. Proc. 65, pending the final determination of this action, enjoining Defendants from utilizing the current Department of Defense "Statement of DoD Principles for News Media" in determining Plaintiffs' request for press access to American troops in Afghanistan and wherever else hostilities occur during Operation Enduring Freedom, particularly overt combat activities.

II. JURISDICTION AND VENUE

4. Jurisdiction in this case in based on 28 U.S.C. §1331 and the Constitution of the United States. Further, 28 U.S.C. §2201 authorizes this Court to grant the requested declaratory relief.

5. Pursuant to 28 U.S.C. §1391(e), venue is proper because Defendants reside in this district and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

III. THE PARTIES

6. Plaintiff Larry Flynt, resides in California and is a publisher.

7. Plaintiff LFP, Inc. is a California corporation which publishes *inter alia*, Hustler magazine.

8. Defendant Donald H. Rumsfeld is Secretary of the United States Department of Defense. In that capacity, Secretary Rumsfeld exercises authority, direction and control over the Department of Defense.

9. The Department of Defense is an agency of the Executive Branch of the federal government and is charged with the responsibility of conducting military affairs under the authority of the President of the United States.

IV. FACTUAL BACKGROUND

10. On the morning of September 11, 2001, two commercial airline jets collided with and destroyed the World Trade Center Towers in New York City, killing more than 3,000 people.

11. That same morning, another commercial airliner crashed into the Pentagon in Washington, DC, killing approximately 189 members of the military services, civilians and airline passengers.

12. Also on September 11, 2001, a commercial airline jet crashed in Pennsylvania, killing 45 people.

13. Upon information and belief, federal authorities investigating these tragic incidents have concluded that they were the result of coordinated terrorist attacks.

14. In an address to a joint session of Congress on September 20, 2001, President George W. Bush announced that the evidence gathered during the course of law enforcement investigations into the afore-mentioned terrorist incidents pointed to "a collection of loosely affiliated terrorist organizations known as al Qaeda."

15. In that same address to the joint session of Congress, President Bush demanded that the Taliban regime controlling most of the country of Afghanistan comply with certain demands, including the closing of every terrorist training camp and the surrender of all terrorists within Afghanistan.

16. On October 7, 2001, President Bush addressed the nation to announce that the United States military had begun to undertake military actions against al Qaeda terrorist training camps and the military installations of the Taliban regime in Afghanistan. He announced that the name of this military operation is Enduring Freedom.

17. Operation Enduring Freedom continues through this date.

18. Upon information and belief, Operation Enduring Freedom currently involves the activities of various United States armed forces, particularly in the areas of Central and Southern Asia, including the countries of Afghanistan and Uzbekistan.

19. Upon information and belief, Operation Enduring Freedom involves components of the United States Army, Navy, Air Force and Marines.

20. Upon information and belief, the source of which is various media reports and statements made by Department of Defense and military officials, the United States has American military personnel currently conducting operations on the ground in Afghanistan.

21. Upon information and belief, the source of which is a transcript of remarks made by Secretary of Defense Rumsfeld to correspondents on November 11, 2001, American ground forces have been in Afghanistan for some time at a number of different locations. These American forces have been, among other things, acting as liaisons with Northern Alliance forces opposing the Taliban regime, coordinating military resupply efforts, and providing targeting information to United States air warfare assets.

22. Upon information and belief, the source of which is a transcript of a press briefing given by Secretary of Defense Rumsfeld on November 13, 2001, a number of American special forces units are in Afghanistan assisting forces opposing the Taliban regime.

23. Upon information and belief, the source of which is the aforementioned November 13, 2001 press briefing transcript, United States special operation forces are also working against Taliban forces in Southern Afghanistan.

24. Upon information and belief, "regular" Army and Marine Corps troops are also deployed in Afghanistan.

25. Upon information and belief, American soldiers have engaged in overt combat activities in Afghanistan.

26. Upon information and belief, American soldiers have been used to open and secure a "land bridge" to Uzbekistan and to repair airports in Afghanistan, all for the purpose of assisting the distribution of humanitarian aid in Afghanistan.

27. The presence of United States military forces in Afghanistan and surrounding countries is a topic of great national concern, particularly in light of the tragic events of September 11, 2001.

28. The actions of United States military personnel within Afghanistan are a topic of national interest and debate.

29. In particular, the overt combat actions of American soldiers on the ground in Afghanistan are of great interest and concern to American citizens.

30. The First Amendment of the United States Constitution protects and guarantees the right of the press to gather and publish news to the American public.

31. The First Amendment of the United States Constitution protects and guarantees the right of the press to gather information concerning United States military activities and to report news of such activities to the American public.

32. Larry Flynt and LFP, Inc., as publisher of Hustler magazine, engage in the constitutionally protected activity of gathering and disseminating news to the American public.

33. Hustler magazine was founded by Larry Flynt in 1974 and currently has a readership of approximately one million.

34. Hustler magazine has an interest in providing its readership with news about American military activities in Afghanistan and wherever else Operation Enduring Freedom requires the commitment of United States military forces.

35. Hustler magazine has been at the journalistic forefront on issues concerning the Taliban regime and terrorism.

36. In January 1996, Hustler magazine published an article on terrorism entitled "Killer Chemicals: Terrorists' new tools."

37. Long before the recent tragic terrorist events in the United States, Hustler magazine published an article on Islamic extremists entitled "The New Crusade: Islam's Holy War against the world."

38. On the topic of the Taliban regime's involvement in the opium trade, Hustler magazine published "Heroin for Allah: Fanatical Muslims Push Opium Between Prayers" in December 1999.

39. An article entitled "Terrorism: A Survival Guide" is planned to run in the February 2002 issue of Hustler magazine.

40. Hustler magazine has not come lately to these important current issues of national debate for the American public.

41. Plaintiffs Larry Flynt and LFP, Inc. seek to continue reporting to the American public on issues related to America's campaign against terrorism.

42. In furtherance of its desire to report news concerning Operation Enduring Freedom to its readership, on October 30, 2001, Larry Flynt sent a letter on behalf of LFP, Inc., to Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs (see Flynt letter attached as Exhibit A).

43. Assistant Secretary of Defense Clarke was appointed by President George W. Bush on April 5, 2001 and is responsible for all matters relating to Department of Defense public information.

44. Pursuant to Department of Defense Directive 5122.5, issued September 27, 2000, the Assistant Secretary of Defense for Public Affairs is the principal staff assistant and advisor to the Secretary and the Deputy Secretary of Defense for Department of Defense news media relations.

45. In this capacity, the Assistant Secretary of Defense is charged with, among other things, ensuring the free flow of news and information to the news media and evaluating news media requests for Department of Defense support and cooperation.

46. Enclosure 3 to Department of Defense Directive 5122.5 is entitled "Statement of DoD Principles for News Media."

47. By motion dated November 23, 2001, Plaintiffs moved for an injunction preliminarily enjoining Defendants from violating Plaintiffs' First and Fifth Amendment rights.

48. In response thereto, Defendants filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction" [hereinafter "Memorandum in Opposition"].

49. In their Memorandum in Opposition, Defendants state that "DoD's general policies regarding media access to military operations are set forth as an enclosure to DoD Directive 5122.5. See DoD Directive 5122.5, Enclosure 3, "Statement of DoD Principles for News Media." See p.4 of Defendants' Memorandum in Opposition.

50. Paragraph E3.1.1 of the Statement of DoD Principles for News Media states that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations."

51. The degree to which press coverage of American military activities in Afghanistan will be "open and independent" is determined by Defendants.

52. In their Memorandum in Opposition to Plaintiffs' preliminary injunction motion, Defendants acknowledged that while "'[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations' . . . security and logistical concerns may limit or preclude media participation in some circumstances." See p.4 of Memorandum in Opposition.

53. Paragraph E3.1. of Statement of DoD Principles for News Media also requires that:

> Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S.

> Armed Forces and their operations. Violation of the ground rules may result in suspension of credentials and expulsion from the combat zone of the journalist involved.

54. In order to obtain the required permission from Defendants, in Larry Flynt's October 30, 2001 letter to Assistant Secretary of Defense Clarke, Plaintiffs requested that Hustler magazine correspondents be allowed to accompany and report on American ground forces in Afghanistan and wherever else such forces may be utilized in the campaign against terrorism.

55. Further, Plaintiffs also specifically requested that Hustler correspondents be given permission to accompany ground troops on combat missions, and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom.

56. In their October 30, 2001 written request to Assistant Secretary Clarke, Plaintiffs asserted their First Amendment rights of access to American military personnel in the battlefield and in combat, but specifically promised to "comply with any reasonable, necessary and narrowly tailored reporting restrictions" intended to advance operational security in a material way.

57. In numerous prior military conflicts, the constitutional right of press access to American soldiers on the battlefield and in combat has been accommodated by United States military authorities, subject to reasonable and necessary security precautions typically related to preserving the secrecy of an operation in advance and limiting the reporting of militarily sensitive operational

details during and after the conclusion of a military operation.

58. The press has had access to the battlefield and actual combat operations, subject to reasonable restrictions to preserve operational security and the safety of the participants, in, for example, the Civil War, World War I, World War II, Korea and Vietnam.

59. Since Vietnam, the Department of Defense and United States military officials have undertaken to limit press access to the battlefield.

60. In only two prior instances has an issue involving the First Amendment's guarantee of press access to the battlefield been presented to a court of the United States.

61. Plaintiff Larry Flynt challenged the Department of Defense's denial of press access during the combat operations of the Grenada conflict in 1983, but a resolution of the merits of his claims was not reached because the end of the Grenada conflict rendered the lawsuit moot according to the United States District Court for the District of Columbia. See, Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985).

62. During the Persian Gulf War, National Magazine and numerous other Plaintiffs sued to vindicate their First Amendment rights to press access to the battlefield, but this lawsuit was declared moot by the United States District Court for the Southern District of New York in light of the cessation of hostilities. See, Nation Magazine v. United States Department of Defense, 762 F.Supp. 1558 (S.D.N.Y. 1991).

63. Operation Enduring Freedom and American military operations in Afghanistan continue through this date.

64. In reporting on the bravery and sacrifices of American servicemen and women during Operation Enduring Freedom, particularly those engaged in combat activities, Plaintiffs have no intention of breaching United States military operational security requirements and will allow United States military authorities to review and revise any information gained during such operations prior to publication in order to ensure operational security.

65. Larry Flynt and LFP, Inc. are as concerned with the preserving of firsthand correspondent accounts of American military activities, particularly on the battlefield, for historical analysis as they are committed to timely and accurate reporting of current events. Consequently, even if military censors limited Hustler correspondents, for example, to reporting only five minutes of an hour's footage or observations of an operation or other military activity, at least the remaining 55 minutes would remain available for reporting to the American public at a time when military operational security would not be jeopardized.

66. Indeed, Plaintiffs' intentions dovetail with the perspectives of high ranking military and Defense Department officials.

67. Upon information and belief, the source of which is a transcript of public remarks made at a working session of the Brookings Institute and the Pentagon on November 8, 2001, Rear Admiral Craig R. Quigley, presently assigned to assist the Assistant Secretary of Defense for Public Affairs, addressed a question concerning operational security and stated, "I've never run into the

news organization yet who is looking to put American forces at risk, so that's easy."

68. Upon information and belief, the source of which is the same transcript of the Brookings Institute/Pentagon working session on November 8, 2001, Assistant Secretary of Defense for Public Affairs Victoria Clarke addressed a question concerning press coverage of Army Rangers special operations Activities as follows:

> But to follow up on something that Admiral Quigley was saying and to your question, Kirk, I have very few to no concerns about how the media would handle very sensitive situations. I have complete and total confidence that the correspondents who are covering this war care as much as we do about the men and women in uniform and their safety. Many of you all know them far better than I do. I know for a fact that people do not want to go out of their way and risk operational security of any kind. So I have complete and total confidence that that would be fine. When you can get over some of these issues that we've been talking about, once they're hooked up I have complete and total confidence the situation will be fine.

69. Having not received a response from Assistant Secretary of Defense Clark, by letter dated November 12, 2001, Larry Flynt renewed LFP, Inc.'s request to the Department of Defense for permission to have Hustler magazine correspondents accompany American ground forces in Afghanistan and report on their actions in this war against terrorism (see November 12, 2001 letter attached as Exhibit B).

70. On November 15, 2001, the Office of the Assistant Secretary of Defense faxed a copy of a letter purportedly written to Larry Flynt by Assistant Secretary of Defense Clarke on November 7, 2001. A copy of this undated letter with facsimile cover sheet is attached as Exhibit C.

71. In this letter, Assistant Secretary Clarke states, "I agree completely a free press, including its coverage of military operations, is critical to upholding one of the fundamental principals upon which this country was founded."

72. Assistant Secretary Clarke also noted in this correspondence that the Department of Defense had facilitated press coverage of strikes, humanitarian drops and interviews of men and women serving "in the region." Assistant Secretary Clarke advised Plaintiff to contact the 5th Fleet Public Affairs Officer if Plaintiffs are interested in similar access.

73. Since Plaintiffs were not interested in and had not requested access to the types of press coverage offered by Assistant Secretary Clarke, Plaintiffs did not contact the 5th Fleet Public Affairs Officer.

74. As to Plaintiffs' specific request for permission to accompany American soldiers on the ground in Afghanistan and to report news of their activities back to the American public, Assistant Secretary Clarke, citing the "highly dangerous and unique nature of their work," explained only that, "We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities."

75. Assistant Secretary Clarke labeled the American military activities in Afghanistan as "special

operations activities," but did not explain what that term encompassed.

76. Plaintiffs' request for press access to American troops in Afghanistan was not limited to "special operations activities."

77. Having had Plaintiffs' request for permission to accompany ground troops in Afghanistan and to report news of their activities to the American public under consideration since October 30, 2001, Defendants have yet to permit Plaintiff to cover the activities of American soldiers on the ground in Afghanistan.

78. Further, while Assistant Secretary Clarke cited the "unique nature" of the work of American ground forces in Afghanistan, she did not provide any specific explanation of what is unique about the nature of American ground troop activities in this campaign as opposed to any other prior military conflict the American press has been allowed to cover from a first-hand perspective.

79. Defendants have not explained or demonstrated why the present United States military action on the ground in Afghanistan is any more dangerous or unique than any prior military conflict during which correspondents have been permitted to accompany ground troops and, indeed, the Plaintiffs allege to the contrary.

80. Defendants' refusal to grant the requested permission to cover the activities of American soldiers on the ground in Afghanistan constitutes a denial of Plaintiffs' request.

81. Upon information and belief, Defendants have handled similar requests for permission for press

access to American ground troops in Afghanistan by other media organizations in a similar fashion.

82. By refusing to grant Plaintiffs' specific October 30, 2001 request for permission to accompany American military personnel on the ground in Afghanistan, particularly those involved in combat operations, and elsewhere as part of Operation Enduring Freedom and to report to the American public news of their actions, Defendants have violated and continue to violate Plaintiffs' First Amendment rights.

83. In light of Assistant Secretary Clarke's denial of their request for press access to combat activities of United States forces in Afghanistan and wherever else such activities occur during Operation Enduring Freedom, Plaintiffs filed a lawsuit in the United States District Court for the District of Columbia, naming Secretary of Defense Donald Rumsfeld and the Department of Defense as Defendants (see Complaint dated November 16, 2001).

84. By motion dated November 26, 2001, Plaintiffs moved for an injunction restraining Defendants from prohibiting or interfering with Plaintiffs' First Amendment rights of press access to, *inter alia*, combat activities of American forces in Afghanistan, during the pendency of the lawsuit.

85. In their preliminary injunction motion, Plaintiffs also sought interim relief against Defendants' violation of their Fifth Amendment due process rights.

86. Defendants have not yet filed an answer to Plaintiffs' complaint and their time to do so has not expired.

87. On or about December 10, 2001, Defendants filed a memorandum in opposition to Plaintiffs' preliminary injunction motion.

88. In Defendants' memorandum in opposition and attached exhibits, Defendants claimed, *inter alia*, that the First Amendment does not afford Plaintiffs a right of press access to the combat activities of American soldiers.

89. Oral argument of Plaintiffs' motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure was heard by the Hon. Paul L. Friedman, United States District Judge, on January 4, 2002.

90. In a Memorandum Opinion and Order filed January 8, 2002, the District Court denied Plaintiffs' request for a preliminary injunction (see Memorandum Opinion and Order attached as Exhibit D).

91. With respect to Plaintiffs' assertion that the First Amendment guarantees a right of press access to the battlefield, including overt combat operations, subject only to reasonable and necessary operational security restrictions, the Court stated as follows:

> The Court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and

confidentiality of information whose dissemination could endanger United Sates soldiers or our allies or compromise military operations. See The National Magazine v. United States Department of Defense, 762 F.Supp., 1558, 1571-74 (S.D.N.Y. 1991). The specific parameters of this First Amendment "qualified right of access" and the adequacy under the Due Process Clause of the guidelines and regulations promulgated by the Department of Defense to implement that right would depend upon the particular circumstances presented. see JB Pictures, Inc. v. Department of Defense, 86 F.3d 236, 238-39 (D.C. Cir. 1996).

FIRST CLAIM
(Declaratory Judgment)

92. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 91 of this Complaint as if fully set forth herein.

93. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law

94. The First Amendment to the United States Constitution guarantees that the press may gather information concerning the activities of American forces on the battlefield and report news of such activities to the American people.

95. The First Amendment right of press access to the battlefield includes a right of access to overt combat operations involving American soldiers.

96. The First Amendment right of press access to the battlefield, including overt American combat operations, cannot be limited except by reasonable, necessary and definite regulations designed to protect the safety and security of both the journalists and those involved in military operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations.

97. Defendants maintain that the First Amendment does not guarantee a right of press access to the battlefield subject to the immediately aforementioned reasonable regulations.

98. Plaintiffs are entitled to a judgment declaring that they have a First Amendment right of access to the battlefield, including overt combat operations, which is subject to reasonable, necessary and definite regulations designed to protect the safety and security of both the journalists and those involved in military operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations.

SECOND CLAIM
(Declaratory Judgment)

99. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 98 of this Complaint as if fully set forth herein.

100. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law

101. The First Amendment to the United States Constitution guarantees that the press may gather information concerning the activities of American forces on the battlefield and report news of such activities to the American people.

102. The First Amendment right of press access to the battlefield includes a right of access to overt combat operations involving American soldiers.

103. The First Amendment right of press access to the battlefield, including overt American combat operations, cannot be limited except by reasonable, necessary and definite regulations designed to protect the safety and security of both the journalists and those involved in military operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations.

104. Defendants maintain that the First Amendment does not guarantee a right of press access to the battlefield subject to the aforementioned reasonable regulations.

105. Defendants' denial of Plaintiffs' October 30, 2001 request for press access to the battlefield -- including combat operations -- in Afghanistan and wherever else hostilities occur during Operation Enduring Freedom, deprived Plaintiffs of their rights as guaranteed by the First Amendment to the United States Constitution.

106. Plaintiffs are entitled to a judgment declaring that Defendants have violated Plaintiffs' First Amendment rights by denying their October 30, 2001 request for press access to the battlefield, including overt combat operations, during Operation Enduring Freedom.

THIRD CLAIM
(Declaratory Judgment)

107. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 106 of this Complaint as if fully set forth herein.

108. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

109. Defendants have denied Plaintiffs access to information gathering and news reporting fora traditionally open to American journalists in violation of Plaintiffs' rights as guaranteed by the First Amendment to the United States Constitution.

110. Plaintiffs are entitled to a judgment declaring that Defendants have improperly denied Plaintiffs access to information gathering and news reporting fora in violation of Plaintiffs' First Amendment rights.

FOURTH CLAIM
(Declaratory Judgment)

111. Plaintiffs repeat and reiterate each and every claim in Paragraphs 1 through 110 of this Complaint as if fully set forth herein.

112. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

113. Plaintiffs have specifically requested, *inter alia,* press access to overt combat activities by American troops in Afghanistan.

114. Defendants have responded, purportedly pursuant to the "guidelines" set forth in Enclosure 3 to Department of Defense Directive 5122.5 ("Statement of DoD Principles for News Media"), by offering Plaintiffs press access to certain air strikes, humanitarian aid drops and interviews of men and women serving "in the region," and directing Plaintiffs to a contact person with the 5th Fleet for purposes of obtaining permission for said coverage.

115. Plaintiffs did not request press access to air strikes, humanitarian drops, or interviews of men and women serving "in the region."

116. Again, purportedly acting pursuant to the guidelines set forth in Enclosure 3 to Department of Defense Directive 5122.5, Defendants denied Plaintiffs' express request for press access to United States military ground forces in Afghanistan, including those engaged in combat operations.

117. The guidelines set forth in Enclosure 3 to Department of Defense Directive 5122.5 are facially invalid because they fail to acknowledge and protect Plaintiffs' fundamental right of access to overt combat activities of American troops, as guaranteed by the First Amendment to the United States Constitution.

118. The failure of the guidelines, relied upon by Defendants, to recognize and protect at least Plaintiffs' First Amendment rights to observe and report on overt combat actions by American ground troops allows Defendants to deny the First Amendment rights of Plaintiffs, and others, by simply refusing to allow any press access to American troops in Afghanistan.

119. Plaintiffs are entitled to a judgment declaring that the guidelines relied upon by Defendants as

set forth in Enclosure 3 to Department of Defense Directive 5122.5 (entitled "Statement of DoD Principles for News Media") violate Plaintiffs' rights under the First Amendment to the United States Constitution.

FIFTH CLAIM
(Declaratory Judgment)

120. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 119 of this Complaint as if fully set forth herein.

121. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

122. Enclosure 3 to Department of Defense Directive 5122.5 (entitled "Statement of DoD Principles for News Media"), relied upon by Defendants in denying Plaintiffs' request for press access to American troops in Afghanistan, does not contain definite and objective standards for use in determining Plaintiffs' request for press access.

123. The Department of Defense's "Statement of DoD Principles for News Media" permits Defendants unfettered discretion to deny press access requests by Plaintiffs, and others, for any reason or no reason.

124. The Department of Defense's "Statement of DoD Principles for News Media" permits Defendants to deny press access requests such as Plaintiffs' for arbitrary, capricious or discriminatory reasons.

125. Defendants in fact denied Plaintiffs' October 30, 2001 request for press access to combat activities of American soldiers for arbitrary, capricious or discriminatory reasons.

126. Defendants' press access permission scheme is facially unconstitutional.

127. Plaintiffs are entitled to a judgment declaring that Enclosure 3 to Department of Defense Directive 5122.5 (entitled "Statement of DoD Principles for News Media"), on its face and as applied, violates Plaintiffs' rights as guaranteed by the First and Fifth Amendments to the United States Constitution.

SIXTH CLAIM
(Declaratory Judgment)

128. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 127 of this Complaint as if fully set forth herein.

129. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

130. Enclosure 3 to Department of Defense Directive 5122.5 (entitled "Statement of DoD Principles for News Media") does not require that Defendants issue a decision on Plaintiffs' press access request within a constitutionally permissible period of time.

131. In fact, it took Defendants fifteen days to respond to Plaintiffs' initial request for press access.

132. The failure of the guidelines relied upon by the Defense Department to place reasonable time limits on official decision making with respect to a press access request allows the suppression of Plaintiffs' First Amendment rights by official inaction or delay on their request.

133. On its face, and as applied, Enclosure 3 to Department of Defense Directive 5122.5 is constitutionally invalid.

134. Plaintiffs are entitled to a judgment declaring that Enclosure 3 to Department of Defense Directive 5122.5 and actions taken by Defendants pursuant thereto violate Plaintiffs' rights as guaranteed by the First and Fifth Amendments to the United States Constitution.

SEVENTH CLAIM
(Declaratory Judgment)

135. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 134 of this Complaint as if fully set forth herein.

136. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

137. Enclosure 3 to Department of Defense Directive 5122.5 (entitled "Statement of DoD Principles for News Media") does not provide for a prompt administrative appeal of Defendants' denial of Plaintiffs' request for press access to American ground forces in Afghanistan.

138. The failure of the guidelines relied upon by the Department of Defense to provide Plaintiffs with prompt administrative review of Defendants' denial of Plaintiffs' request for press access violates Plaintiffs' rights under the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

139. Plaintiffs are entitled to a judgment declaring that Enclosure 3 to Department of Defense Directive 5122.5 violates the First and Fifth Amendments to the United States Constitution, on its face and as applied.

EIGHTH CLAIM
(Declaratory Judgment)

140. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 139 of this Complaint as if fully set forth herein.

141. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

142. Reporters may not report on the combat or battlefield activities of American troops unless they first obtain permission from the United States military.

143. Such permission was sought by Plaintiffs.

144. Defendants' denial of Plaintiffs' request to accompany and report news of the activities of American soldiers on the ground in Afghanistan, including those engaged in combat activities, does not promote a compelling government interest by the least restrictive means.

145. Plaintiffs are entitled to a judgment declaring that Defendants have imposed an unlawful content-based prior restraint depriving Plaintiffs of their fundamental press freedoms as guaranteed by the First Amendment to the United States Constitution.

NINTH CLAIM
(Declaratory Judgment)

146. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 145 of this Complaint as if fully set forth herein.

147. There is an actual and justiciable controversy between the parties for which Plaintiffs have no adequate remedy at law.

148. Defendants' denial of Plaintiffs' request for permission to accompany American soldiers on the ground in Afghanistan, including those engaged in combat activities, and to report news of their activities to the American public is not narrowly tailored to further a substantial government interest while leaving open adequate alternative avenues of communication.

149. Plaintiffs are entitled to a judgment declaring that Defendants have imposed an unlawful prior restraint on Plaintiffs in violation of their rights as guaranteed by the First Amendment to the United States Constitution.

TENTH CLAIM
(Preliminary and Permanent Injunction)

150. Plaintiffs repeat and reiterate each and every claim alleged in Paragraphs 1 through 149 of the Complaint as if fully set forth herein.

151. The foregoing circumstances warrant the granting of injunctive relief pursuant to Fed. R. Civ. Proc. 65 to restrain Defendants from violating Plaintiffs' rights under the United States Constitution both preliminarily and pending the final determination of this action, and permanently thereafter.

152. Upon information and belief, the actions of Defendants as herein described and of those persons acting in concert with them and at their direction have been taken with the express intent and purpose of preventing Plaintiffs from engaging in their reporting and publishing

activities, which are protected by the First Amendment to the United States Constitution.

153. Plaintiffs do not have an adequate remedy at law for Defendants' abrogation of their First and Fifth Amendment rights.

154. Plaintiffs have suffered drastic and irreparable harm to their First and Fifth Amendment rights and will continue to suffer such injury if Defendants are not immediately enjoined from utilizing the current Department of Defense "Statement of DoD Principles for News Media" in determining Plaintiffs' request for press access to American troops in Afghanistan and, further, enjoined from restricting Plaintiffs' First Amendment rights of press access the battlefield, including combat actions, except pursuant to reasonable and necessary regulations intended to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations

155. Plaintiffs are likely to succeed on the merits of their claims.

156. The public interest will be advanced by the issuance of a preliminary injunction.

157. By reason of the foregoing, if not preliminarily enjoined, Defendants will continue to deprive Plaintiffs of their rights under the First and Fifth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs pray that this Court issue:

A. A judgment declaring that the First Amendment to the United States Constitution guarantees the right of the press to gather and report information concerning the activities of American military forces on the battlefield, including overt combat operations, subject to reasonable and necessary regulations intended to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations;

B. A judgment declaring that the guidelines (Enclosure 3 to Department of Defense Directive 5122.5) relied upon by the Department of Defense in determining Plaintiffs' October 30, 2001 request for press access to the battlefields of Operation Enduring Freedom, including overt combat operations, on their face violate the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution by affording Defendants unfettered discretion to deny press access as they see fit;

C. A judgment declaring that the guidelines relied upon by the Department of Defense in denying Plaintiffs' October 30, 2001 request for press access to the battlefields of Operation Enduring Freedom are constitutionally invalid on their face because they fail to require Defendants to act upon Plaintiffs' request for press access within a constitutionally permissible period of time, all in violation of the First and Fifth Amendments to the United States Constitution;

D. A judgment declaring that the guidelines relied upon by the Department of Defense in determining Plaintiffs' October 30, 2001 request for press access to the battlefields of Operation Enduring Freedom are

constitutionally invalid on their face because they do not incorporate a provision allowing for prompt administrative review of a denial of press access, all in violation of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution;

E. A judgment declaring that Defendants' denial of Plaintiffs' October 30, 2001 request for press access to the battlefields of Operation Enduring Freedom, purportedly pursuant to Department of Defense guidelines, as applied, violates Plaintiffs' rights under the First Amendment and the Due Process Clause of the Fifth Amendment;

F. A judgment declaring that Defendants have improperly denied Plaintiffs access to information gathering and news reporting fora in violation of Plaintiffs' First Amendment rights;

G. A judgment declaring that Defendants have imposed an unlawful content-based prior restraint depriving Plaintiffs of their fundamental press freedoms as guaranteed by the First Amendment to the United States Constitution;

H. An order pursuant to Fed. R. Civ. Proc. 65 restraining Defendants from utilizing the current Department of Defense guidelines in determining Plaintiffs' application for press access to the battlefields of Operation Enduring Freedom, including overt combat operations; and

I. Such other or further relief as the Court deems just and proper.

DATED: January 17, 2002

Larry Flynt and
LFP, Inc.

By Their Attorneys,
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA, LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.

By /s/ Paul J. Cambria, Jr.
PAUL J. CAMBRIA, JR., ESQ.

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and

JOHN PERAZICH, ESQ.
Local Counsel and Member of the
District of Columbia Bar

By /s/ John Perazich
JOHN PERAZICH
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EXHIBIT A
AMENDED COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

LFP INC.
Magazine and Media Publishing

October 30, 2001

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

In light of recent tragic events on American soil and the mobilization of United States military personnel in the fight against terrorism, the interest of the American public in its Government's efforts to quell international terror has never been greater. In keeping with its long-standing commitment to reporting on important national and international issues, Hustler magazine plans to cover the American campaign against terrorism extensively. This is a continuation of Hustler magazine's efforts to inform and educate the American public on the realities of terrorism and the involvement of the Taliban in the opium trade (see "Killer Chemicals: Terrorists' New Tools" [January 1996]; "The New Crusade: Islam's Holy War Against The World" [April 1996]; and "Heroin for Allah: Fanatical Muslims Push Opium Between Prayers" [December 1999]). "Terrorism: A Survival Guide" will run in the February 2002 issue. Hustler magazine has been at the forefront of these vital international controversies and intends to continue being in the vanguard of those reporting to America on these crucial issues and events.

A most significant topic of American political and social debate currently is the presence and activities of United States military forces in Southern Asia, most particularly in Afghanistan. These activities have already included the use of American and allied special forces in ground actions within Afghanistan. Further, according to statements by President George W. Bush and Secretary of Defense Donald Rumsfeld, the use of ground forces by the United States and its allies within Afghanistan and, potentially, other areas of Asia and the Middle East can be expected in the future.

The commitment of American and allied ground forces to action in this war against terror is an important topic of great interest to the American public, of which the Hustler magazine readership is a part. Consequently, Hustler magazine has assigned two experienced journalists to report on the battlefield bravery and sacrifices of the men and women in the United States armed forces. As publisher of Hustler magazine and as an American citizen, I ascribe to the belief that a crucial function of the free press guaranteed by the First Amendment is to offer the citizens of this country an informed and independent perspective on the Government's use of military force, wherever it occurs in the world.

Accordingly, on behalf of Hustler magazine, I ask that Hustler correspondents be allowed to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism. I specifically request that Hustler correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom.

This request is in keeping with the American press' historically recognized right of free access to battlefields upon which American men and women are risking their lives to protect and advance the cause of democracy. From the Civil War to the invasion of Normandy in World War II, Korea and the Vietnam War, American journalists have accompanied American troops during combat actions and risked their lives in order to provide accurate and timely information concerning the actions of United States military forces and the progress of United States military campaigns. Press coverage of Operation Enduring Freedom is just as important now as it was during World War II and Vietnam.

While Hustler magazine recognizes the need for operational security and would comply with any reasonable, necessary and narrowly tailored reporting restrictions intended to advance such security in a material way, we believe the right of a free press to battlefield and combat action access is a fundamental guarantee of the First Amendment which can and should be accommodated by United States military officials. Indeed, the military's operational security needs have been met during numerous prior armed conflicts without denying or unreasonably restricting press access to the battlefield. There is no reason why that cannot happen during Operation Enduring Freedom.

Please contact me immediately so that I may know whether the permission I request herein has been granted.

Very truly yours,

/s/ Larry Flynt
Larry Flynt

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT B
AMENDED COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

LFP INC.
Magazine and Media Publishing

November 12, 2001

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

Two weeks have passed since I wrote to you requesting that two Hustler journalists be allowed to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in the United States campaign against terrorism. I specifically requested that Hustler correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom. As of today, I have received no response from you.

I understand that there are many demands on your time and attention during this crucial point in our history. I also believe that the right of a free press to battlefield and combat action access is a fundamental guarantee of the First Amendment, which can and should be accommodated by United States military officials.

Obtaining permission to provide the American public with first hand battlefield reportage is of great importance to me. Please respond as soon as possible to this second request.

Very truly yours,

Larry C. Flynt
LFP, Inc.

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT C
AMENDED COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

FAX COVER SHEET

DATE: 11/15/01

TO: Larry Flynt **PHONE:** (323) 651-6400
FAX: (323) 651-0488

FROM: Torie Clarke **PHONE:** (703) 697-9312
FAX: (703) 695-4299

SUBJECT: This is a fax copy of the letter we mailed on 11/7/01.

Number of pages Including cover sheet: 2

8484 Wilshire Boulevard, Suite 900
Beverly Hills, California 90211

Dear Mr. Flynt,

Thank you very much for your recent letter and interest in covering the war on terrorism.

I agree completely a free press, including its coverage of military operations, is critical to upholding one of the fundamental principles upon which this country was founded.

We have facilitated extensive access to military operations thus far in the war on terrorism. Scores of reporters and photographers have covered the strikes, witnessed the humanitarian drops and interviewed dozens of men and women serving in the region. Should your correspondents be interested in similar access, they should contact Commander Jeff Aldarson, the 5th Fleet Public Affairs Officer at 011-973-724-027.

A particular challenge right now is that the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity. The highly dangerous and unique nature of their work makes it very difficult to embed media. We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities.

Please feel free to contact my office again if we can provide more information.

Sincerely,

/s/ Victoria Clarke
Victoria Clarke
Assistant Secretary of Defense
For Public Affairs

EXHIBIT D
AMENDED COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY FLYNT
and
LFP, INC.,

Plaintiffs,

v.

DONALD H. RUMSFELD,
Secretary of Defense, and
UNITED STATES DEPARTMENT
OF DEFENSE,

Defendants.

Civil Action No. 01-2399 (PLF)

MEMORANDUM OPINION AND ORDER

This matter came before the Court for a hearing on plaintiffs' motion for preliminary injunction. Plaintiffs Larry Flynt and LFP, Inc. seek a preliminary injunction against Donald H. Rumsfeld, the Secretary of Defense, and the United States Department of Defense, restraining them from prohibiting or interfering with plaintiffs' asserted First Amendment right to have Hustler Magazine correspondents accompany American troops on the ground in Afghanistan. In particular, plaintiffs seek permission to observe first-hand

United States troops engaged in combat and to report news of these military activities to the American people, subject to "reasonable and necessary reporting restrictions intended to advance military operational security in a material way." The defendants oppose any such injunction on a variety of grounds, including the ground that judicial review of military decisions with respect to media access to the battlefield may be inappropriate.

On a motion for a preliminary injunction, plaintiffs must demonstrate that they have a substantial likelihood of succeeding on the merits of the case and that they will suffer irreparable injury absent an injunction. The Court must also consider the harm to defendants or other interested parties (balance of harms), and whether an injunction would be in the public interest or at least not be adverse to the public interest. See Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir.1989); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir.1977); Milk Industry Foundation v. Glickman, 949 F. Supp. 882, 888 (D.D.C. 1996).

Plaintiffs are not required to prevail on each of these factors. Rather, the factors must be viewed as a continuum, with more of one factor compensating for less of another. "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir.1995). An injunction may be justified "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." Id. Conversely, when the other three factors strongly favor interim relief, a court may grant injunctive relief when the moving party has merely made out a "substantial" case on the merits. See Washington Metro. Area Transit Comm'n v.

Holiday Tours, Inc., 559 F.2d at 843-45. In sum, an injunction may be issued "with either a high probability of success and some injury, or vice versa." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir.1985). In this case, however, plaintiffs have failed to demonstrate either.

The Court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or our allies or compromise military operations. See The Nation Magazine v. United States Department of Defense, 762 F. Supp. 1558, 1571-74 (S.D.N.Y. 1991). The specific parameters of this First Amendment "qualified right of access" and the adequacy under the Due Process Clause of the guidelines and regulations promulgated by the Department of Defense to implement that right would depend upon the particular circumstances presented. See JB Pictures, Inc. v. Department of Defense, 86 F.3d 236, 238-39 (D.C. Cir. 1996). Whether plaintiffs in this case are likely to succeed on the merits, however, is far from clear.

As defendants point out, it does not appear that plaintiffs have in fact been denied the access they seek or that they necessarily would have been denied such access if they had pursued the matter fully through available military channels. It is true that by letter of November 7, 2001, Assistant Secretary of Defense Victoria Clarke offered plaintiffs only media access for the coverage of air strikes and humanitarian drops and the interview of service persons in the region and not permission to accompany

ground troops on combat missions; but she never denied plaintiffs' request either. See Complaint, Ex. C, November 7, 2001, Letter from Assistant Secretary Victoria Clarke to Larry Flynt. Rather, she indicated that the only U.S troops on the ground at that time were involved in "special operations activity," making it difficult for the media to accompany troops on combat missions; but she also said that the Department of Defense would attempt to allow greater access to ground troops as conditions in Afghanistan evolved. Id. She further advised Mr. Flynt to contact Commander Jeffrey Alderson to make arrangements for some form of access -- admittedly, not the precise type of access plaintiffs sought. See id. Plaintiffs chose not to pursue this avenue but filed this lawsuit instead. Based on the record as it currently stands, therefore, the Court cannot find that the Department of Defense has denied plaintiffs' request for access and, in view of changed circumstances, cannot say that any such request would not have been granted -- or would not now be granted -- at least in part.

As Commander Alderson states in his declaration of December 10, 2001, "[t]he military situation in and around Afghanistan has been a rapidly changing, fluid environment and so the support for press coverage has also passed through several phases. . . . [Today] representatives of American news media, as well as foreign journalists, are present in Afghanistan and are providing extensive coverage of Operation Enduring Freedom." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Ex. E, Declaration of William Jeffery Alderson ¶¶ 3, 5. Press reports of November 27 and December 9, 2001 (and presumably others) indicate that members of the press recently have been allowed to accompany U.S. troops on the ground in Afghanistan, although it is unclear whether these journalists have been permitted to witness actual combat conditions. See, e.g., Lee Hill Kavanaugh, Soldiers in Chaotic Land Kindle Harmony

at Home, Kansas City Star, Dec. 9, 2001, at A1; Reporters Accompany Marines; First Allowed by Pentagon to Cover Combat, Commercial Appeal, Nov. 27, 2001, at A6. Obviously, a great deal has changed in the ever-evolving situation since Assistant Secretary Clarke's letter to Mr. Flynt of November 7, coverage of troop activities in Afghanistan in the intervening weeks has increased, and the media now has some level of open access to American troops on the ground in Afghanistan. Thus, it is not certain that a request for access by plaintiffs, if one were made, would be denied at this time.

So far as appears, plaintiffs have the same right of access to military operations in Afghanistan as do other members of the media. As discussed above, media access has increased in recent weeks, and plaintiffs have failed to demonstrate how or whether the defendants now would deny access to them. Plaintiffs therefore have failed to demonstrate that they will suffer irreparable harm in the absence of a preliminary injunction. Furthermore, in the absence of a stronger showing by plaintiffs, the balance of harms and the public interest weigh heavily in defendants' favor. The Department of Defense has expressed, albeit somewhat vaguely and with minimal detail, its commitment to providing the media with open access to military operations in Afghanistan, consistent with operational and security concerns, and the media in fact has enjoyed increased access since this lawsuit was filed. Whether defendants are doing enough to satisfy the First Amendment or the Due Process Clause are questions that will have to await the development of a fuller record. On the facts and circumstances presented at this stage, however, plaintiffs have failed to demonstrate their entitlement to injunctive relief. For all of these reasons, it is hereby

ORDERED that plaintiffs' request for a preliminary injunction is DENIED. The parties are encouraged to agree

on an expedited briefing and argument schedule for consideration of the defendants' motion to dismiss or for summary judgment.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 1/8/02

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,

Plaintiffs,

v. Case No. 1:01cv02399 (PLF)

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE,

Defendants.

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense respectfully move the Court to dismiss this action for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Alternatively, Defendants move for summary judgment because "there is no genuine issue as to any material fact and [Defendants are] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The grounds for this motion are set forth in the accompanying memorandum of law. A proposed Order is attached.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/ John R. Griffiths
DAVID J. ANDERSON
VINCENT M. GARVEY
JOHN R. GRIFFITHS (D.C. Bar No. 449234
United States Department of Justice
Civil Division, Federal Programs Branch
Post Office Box 883
Washington, D.C. 20044
(202) 514-4652 (telephone)
(202) 616-8470 (fax)

Counsel for Defendants

EXHIBIT A
TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

LFP INC.
Magazine and Media Publishing

January 15, 2002

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

On October 30, 2001 I wrote to you and specifically requested permission to send a reporter to cover actual combat activities occurring throughout the course of the United States military campaign known as Operation Enduring Freedom, whenever and wherever such combat shall occur. In connection with this request I of course acknowledged that our correspondents would be subject to reasonable and necessary restrictions designed to maintain the safety and integrity of any such missions.

I did not receive a response to my letter until November 15, 2001 when a fax was sent to me which had appended thereto a letter you purportedly sent to me on November 7, 2001. The copy, however, did not bear any date nor did I receive any such letter before that time. In your letter you stated that:

> We have facilitated extensive access to military operations thus far in the war on terrorism. Scores of reporters and photographers have covered the strikes,

> witnessed the humanitarian drops and interviewed dozens of men and women serving in the region. Should your correspondents be interested in similar access, they should contact Commander Jeff Alderson, the 5th Fleet Public Affairs Officer at 011-973-724-027.

I did not contact Mr. Alderson because I did not request any such access or similar access. Rather, I specifically requested reporter access to actual battlefield combat activities.

In your letter you went on to state:

> A particular challenge right now is that the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity. The highly dangerous and unique nature of their work makes it very difficult to embed media. We're exploring many options, however, and remain hopeful that we can facilitate some aspect of special operations activities.

You nowhere explained the meaning of the conclusory phrases "special operations activities," "highly dangerous and unique nature of their work," etc., nor indicated any guidelines issued by the Department of Defense explaining such terms or any standards under which they are explained.

As you know, I thereafter filed suit seeking declaratory and injunctive relief. In a preliminary ruling Honorable Paul L. Friedman, United States District Judge for the District of Columbia, speculated whether the specific access I seek may indeed be available at this time. Accordingly, I specifically renew my request for permission

to have a reporter employed by me accompany ground troops in order to cover actual combat activity carried out in connection with the current military campaign known as Operation Enduring Freedom. It is my position that battlefields wherein American troops have fought have historically been open to reporters so they could cover firsthand American military campaigns and that such access is guaranteed by the First Amendment to the United States Constitution.

I once again acknowledge that the First Amendment right to gather and report news involving United States military operations on foreign soil is subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations. We will, of course, abide by any such regulations reasonably deemed necessary to advance military operational security in a material way.

I further request most respectfully that you reply promptly to this request and, further, that you specify any regulations that you may rely upon in submitting your answer to this request.

Very truly yours,

/s/ Larry Flynt
Larry Flynt

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT B
TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

LFP INC.
Magazine and Media Publishing

January 30, 2002

Hon. Victoria Clarke
Assistant Secretary of Defense
Public Affairs
1400 Defense Pentagon, Room 2E800
Washington, DC 20301-1400

Dear Assistant Secretary Clarke:

On January 15, 2002, I sent you a written request for permission to send a reporter to cover actual combat activities occurring throughout the course of the United States military campaign known as Operation Enduring Freedom, whenever and wherever such combat shall occur. Fifteen days have now passed as of the time of the writing of this letter and I have yet to receive a response from you to my request for permission to cover American combat activities in Afghanistan. As Assistant Secretary of Defense for Public Affairs, I am sure that you understand the time-sensitive nature of requests for permission to cover and report on current and developing affairs of the national government. As can be seen by the intense public interest in the United States military actions taken thus far in furtherance of Operation Enduring Freedom, there are few items of such great import to American citizens as the conduct of this campaign against terror.

Regrettably, during the time that you continue to have my January 15, 2002 request for coverage permission under consideration, United States military activities

(particularly combat activities in Afghanistan), appear to continue. For example, I draw your attention to the January 24, 2002 United States military attack against certain installations at Hazar Kadam, Afghanistan in which approximately fifteen non-Americans were killed and twenty-seven individuals were taken into custody by American forces (as reported by Rear Admiral John Stufflebeem at a Department of Defense news briefing on January 28, 2002). Obviously, Hustler magazine would certainly have been interested in accompanying American soldiers involved in this operation and, subject to reasonable regulations intended to protect the safety and security of those involved in the operations and the secrecy and confidentiality of any information pertaining thereto, would have been interested in reporting on such combat action to the American people.

We would appreciate an immediate response to the January 15th correspondence. We have a correspondent ready to cover actual combat activities upon receipt of the permission requested of you.

Very truly yours,

/s/ Larry Flynt
Larry Flynt

cc: Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.

EXHIBIT C
TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1400

Mr. Larry Flynt

February 4, 2002

LFP Inc.
8484 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90211

Dear Mr. Flynt,

Thank you for your letters of January 15 and 30. Again, I will reiterate that we have provided extensive access to our operations to hundreds of reporters. There is nothing to preclude your reporter from getting equal access. All he or she needs to do is work with our people on the ground. A list of contact numbers is attached.

While I have no interest in engaging in a protracted legal discussion of the First Amendment, I think you would find our respective thoughts and positions on this subject are remarkably similar. I meet regularly with news bureau chiefs from a wide array of organizations, think tanks, Congressional staffers, academics, industry leaders and other interested groups to discuss how we might improve access, information flow, logistics support and other related matters. I think most participants would agree these sessions have been helpful in surfacing the key issues and resolving the tough problems. We publish transcripts from many of these sessions on our web site.

You asked for the guidelines we use for deciding such matters. DoD Directive 5122.5 (available on line at http://www.dtic.mil/whs/directives/corres/html/51225.h

tm) offers a basic outline of our functions, organization and policies for providing information to the public. The DoD Principles of Information (on line at http://www.defenselink.mil/admin/prininfo/(pdf) summarize many of the key points.

We also rely heavily on the judgment of our commanders in the field to work out the practicalities of how these policies and principles are applied. I see myself as an advocate for the press and public interests - sitting at the seat of government - working with the many constituencies that have a stake in such matters.

The results of our commitment to fair and open press coverage speak for themselves: despite an overriding need to maintain operational security, protect lives and preserve response options in a very new and unconventional war on terrorism, we continue to maintain the highest possible degree of transparency, openness and inclusion of the media and the public.

Sincerely,

/s/ Victoria Clarke
Victoria Clarke
Assistant Secretary of Defense
for Public Affairs

OPERATION ENDURING FREEDOM
PUBLIC AFFAIRS POINTS OF CONTACT

U.S. CENTRAL COMMAND PUBLIC AFFAIRS

Director:	RDML Craig Quigley quiglecr@centcom.mil	813-827-5895
Deputy:	COL Rick Thomas thomasap@centcom.mil	813-827-6393
Plans Chief:	LTC Jim Yonts yontsjr@centcom.mil	813-827-6762
Ops Chief:	CDR Ernest Duplessis duplesel@centcom.mil	813-827-6763
Media Chief:	Lt Col Chip Compton compton@centcom.mil	813-827-6764
Admin Chief:	YN2(AW) Brian McGee mcgeebk@centcom.mil	813-827-5895

FOR REQUESTS TO VISIT OR EMBED WITH LAND FORCES:

Coalition Forces Land Component Commander (CFLCC) Public Affairs

CFLCC PAO: LTC Bonnie Hebert 011-965-468-2292
efhebertb@kuwait.army.mil
Cell: 011-965-980-6135

CFLCC Deputy: Maj Rich Steele 011-965-468-8040
efsteeler@kuwait.army.mil

CFLCC Battle Captain: 011-965-468-2583
(24-hour operations)

CFLCC Forward Public Affairs, Uzbekistan/K2

PAO: Maj Scott Stearns DSN: 318-681-2280

Bagram Media Center

PAO: CPT Bryant DSN: 318-640-0371

Qandahar Media Center

PAO: MAJ AC Roper
CPT Tony Rivers 011-973-922-4018
tony.rivers@us.army.mil

Canadian PAO MAJ Chris LeMay

Norwegian PAO

Mazar-E Sharif Media Center

PAO: Maj Lancaster DSN: 318-474-2005
Ext. 105
eflancasterr@kuwait.army.mil

Coalition Joint Civil Military Operations Task Force

PAO LTC Pete Pearse

Coalition Forces Air Component Commander Public Affairs
Fifth Fleet, Bahrain

PAO Capt. Richard Johnson

JTF-SWA MAJ Brett Morris
JO1 Hunter

FOR REQUESTS TO VISIT MILITARY FORCES ON SHIPS:

Coalition Forces Maritime Component Commander Public Affairs Fifth Fleet, Bahrain NAVCENT

PAO: CDR Jeff Alderson 011-973-724-840 or 561
pao@cusnc.navy.mil

MISCELLANEOUS

MARCENT

PAO: LtCol Pat Sivigny 808-477-8308
sivignyPA@mfp.usmc.mil

ARCENT, Fort McPherson, Georgia

Public Affairs Office 404-464-4691

CENTAF

Public Affairs Office 803-895-2875

Islamabad, Pakistan

BG John Hawkins 011-925-128-70428
theHAWKIII@yahoo.com

From: Roger Wilcox [mailto:rwilcox@lipsitzgreen.com]
Sent: Tuesday, February 19, 2002 12:29 AM
To: Efhebertb@kuwait.army.mil
Subject: Press Access Request

** Confidential **

Dear Lieutenant Commander Hebert:

I represent Larry Flynt and LFP, Inc., publisher of Hustler magazine, in their efforts to obtain permission from the Department of Defense to have a Hustler magazine correspondent accompany American soldiers engaged in combat operations occurring during the course of Operation Enduring Freedom. In particular, in several correspondences to Assistant Secretary of Defense Victoria Clarke since October 2001, Larry Flynt and LFP, Inc., have requested permission to have Hustler magazine correspondents accompany and report on the activities of American soldiers on the ground in Afghanistan who are engaged in combat actions. To date, no such permission has been granted, but by letter dated February 4, 2002, Assistant Secretary Clarke advised Mr. Flynt to contact you to obtain the approvals required to obtain access to American soldiers engaged in combat operations in Afghanistan.

Accordingly, on behalf of Larry Flynt and LFP, Inc., I request permission to have a Hustler magazine correspondent embed with American land forces in Afghanistan for the purposes of accompanying them on their missions and reporting news of their activities, particularly in combat situations, subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations.

A response at your earliest convenience would be appreciated. Thank you.

Roger W. Wilcox, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	) Case No.
DONALD H. RUMSFELD, SECRETARY	) 1:01cv02399
	) (PLF)
OF DEFENSE, and THE UNITED STATES	)
DEPARTMENT OF DEFENSE,	)
	)
Defendants.	)
	)

DECLARATION OF MAJOR LEANNE SMULLEN

1. I am a Public Affairs Officer with the United States Army. I am currently based at the Coalition Press Information Center in Bagram, Afghanistan.

2. The Coalition Press Information Center gives journalists who are covering U.S. military operations on and around Bagram Air Base a place to work and file their stories. My current duties include facilitating media to embed with and cover military operations, answering queries from the media and arranging for interviews between soldiers and the media.

3. The statements made in this declaration are based on my personal knowledge and information furnished to me in the course of my official duties.

4. David Buchbinder, a reporter working for Hustler Magazine, arrived at the Bagram Air Base on March 18, 2002. He stayed on the base for two nights, covered various events here, and interviewed soldiers from the 10th Mountain Division and the 101st Airborne Division. He returned to the base on April 6 and conducted additional interviews. I believe he remains in the area, and we will attempt to accommodate any future requests he may have, subject to availability and security considerations that apply to all reporters.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of April, 2002 in Bagram, Afghanistan.

(original signed)
MAJOR LEANNE SMULLEN
UNITED STATES ARMY

EXHIBIT A
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

From: CFLCC-Hebert, Bonnie B. LTC
Sent: Friday, February 22, 2002 9:22 PM
To: Roger Wilcox
Cc: CFLCC-Pool, Jeff CPT; CFLCC-Lawrence, Aaron S. SFC
Subject: Press Access Request

We are working on your request. Where exactly in Afghanistan would you like to go? Give me a little more detail of who you want to send and when and what type of operations they want to cover and for how long.

V/R
LTC Hebert

LTC Bonnie Hebert
CFLCC PAO
DSN: 318-438-8040
Civ. from US: 011-965-468-8040

----Original Message----
From: Roger Wilcox [mailto:rwilcox@lipsitzgreen.com]
Sent: Tuesday, February 19, 2002 12:29 AM
To: Efhebertb@kuwait.army.mil
Subject: Press Access Request

** Confidential **

Dear Lieutenant Commander Hebert:

I represent Larry Flynt and LFP, Inc., publisher of Hustler magazine, in their efforts to obtain permission from the Department of Defense to have a Hustler magazine correspondent accompany American soldiers engaged in

combat operations occurring during the course of Operation Enduring Freedom. In particular, in several correspondences to Assistant Secretary of Defense Victoria Clarke since October 2001, Larry Flynt and LFP, Inc., have requested permission to have Hustler magazine correspondents accompany and report on the activities of American soldiers on the ground in Afghanistan who are engaged in combat actions. To date, no such permission has been granted, but by letter dated February 4, 2002, Assistant Secretary Clarke advised Mr. Flynt to contact you to obtain the approvals required to obtain access to American soldiers engaged in combat operations in Afghanistan.

Accordingly, on behalf of Larry Flynt and LFP, Inc., I request permission to have a Hustler magazine correspondent embed with American land forces in Afghanistan for the purposes of accompanying them on their missions and reporting news of their activities, particularly in combat situations, subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations.

A response at your earliest convenience would be appreciated. Thank you.

Roger W. Wilcox, Jr.

EXHIBIT B
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

From: CFLCC-Lawrence, Aaron S. SFC
Sent: Saturday, March 02, 2002 6:49 AM
To: 'rwilcox@lipsitzgreen.com'
Subject: Embedding with US Forces

Sir,

Understand that you would like to cover operations in the Afghan theatre. We can basically facilitate your request in a couple of different ways and all depends on what you are hoping to cover.

If you would like to actually stay with combat soldiers in the Afghan theatre, the best place would be Kandahar where we are allowing media to stay right on the air base.

If you are looking to cover humanitarian assistance or civil affairs the best place for you to go would be Kabul where the military headquarters is located for these activities. Also, just 30 miles away from Kabul is a U.S. base at Bagram air field.

Kandahar would probably work for covering the 101st Abn Division and the operations there that include explosive ordnance disposal, airfield operations and many other things. At this time we have not limited the amount of time reporters stay with reporters because space has not been an issue. That may or may not change in the future but I believe that I can safely guess that you would be able to embed and stay on the air field for a few weeks if that is what you'd like to do.

Bagram and Kabul, on the other hand, don't offer as much of a chance to embed and stay with U.S. soldiers. For the most part you can go out and stay with the forces for about 2-5 days dependent upon what the local commander is able to support. The soldiers and stories there can still be covered daily just by meeting with the public affairs soldiers daily and letting them know what you need. Most reporters there stay out in town and then do day trips to the air field.

So the first question from me to you is do you want to physically stay with soldiers for an extended period of time? If so then you want to go to Kandahar. If that isn't such a big consideration or if you would rather stay in a hotel, Bagram and Kabul are probably better options. I will tell you that the activities in Kabul and Bagram are not being reported on with the frequency that Kandahar is so I don't know if that sways your opinion or not.

As far as getting in to the country, right now we are finding that the best way for reporters to get in is to go to Islamabad Pakistan and catch a $60 United Nations flight into Kabul. From there as stated previously, Bagram is just 30 miles away. Also there is the possibility of taking military aircraft form Bagram to Kandahar. That is not something that I can not guarantee but it has happened in the past provided the flights exist.

The other route to Kandahar right now is to fly to Qutte, Pakistan and then hire vehicles and take the land route.

For a while we were able to escort media into the country from Kuwait but that is not running right now. If that opens back up before your departure date I will get back in touch with you and let you know that additional option exists. Please let me know your travel plans so I can let our forward deployed public affairs soldiers know when to

expect you. If you have additional questions or story coverage ideas please let me know.

R/
Sgt. 1st Class Lawrence
Media Chief
CFLCC Public Affairs
DSN: 318-438-2292
Comm. from US: 011-965-468-2292

----Original Message----
From: Roger Wilcox [mailto:rwilcox@lipsitzgreen.com]
Sent: Tuesday, February 19, 2002 12:29 AM
To: Efhebertb@kuwait.army.mil
Subject: Press Access Request

** Confidential **

Dear Lieutenant Commander Hebert:

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Accordingly, on behalf of Larry Flynt and LFP, Inc., I request permission to have a Hustler magazine correspondent embed with American land forces in Afghanistan for the purposes of accompanying them on their missions and reporting news of their activities, particularly in combat situations, subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations.

A response at your earliest convenience would be appreciated. Thank you.

Roger W. Wilcox, Jr.

EXHIBIT C
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

From: David Buchbinder
[mailto:davidbuchbinder@yahoo.com]
Sent: Friday, March 08, 2002 6:29 AM
To: eflawrencea@kuwait.army.mil
Subject: Embedding with US Forces

Sgt. 1st Class Aaron S. Lawrence
Media Chief
CFLCC Public Affairs

Sir,

I will be reporting on the conflict in Afghanistan for Hustler Magazine. Any assistance you may be able to provide to help me get situated upon arrival will be greatly appreciated.

My primary objective is to physically stay with soldiers at their bases, and to accompany them on combat missions. Since the focus of my reporting will be the men and women of the United States combat forces, I would like to spend as much time with them as possible.

I will be arriving at Islamabad on the evening of Monday, March 11th. By the morning of Wednesday, March 14th at the very latest, I should be en route to Kabul, via air. At that point, I would like to go directly to Bagram and embed with troops on the base. Alternately, if possible, I would like to embed at the Pul-i-Kandahar helicopter base. I understand that current combat operations are taking place in the Shah-i-Kot valley, but I am flexible, and would be able to accompany soldiers on other current or future operations. For example, the presence of Gulbaddin Hekmatyar in

Herat is likely to degrade the security situation in that province. Should soldiers be deployed to that area in the near future, I would like to accompany them.

It would aid me greatly in my work to have a list of military media liaisons on the ground in Afghanistan, and their contact numbers. Any information about credentials that I would need to facilitate access and movement in the country would also be appreciated.

Thank you in advance for any assistance you may be able to provide. I can be reached by e-mail at davidbuchbinder@yahoo.com. My satellite phone number is (480) 768-2500, and the 12-digit satellite prompt is 8816-314-61432.

Sincerely,

David Buchbinder

EXHIBIT D
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

DEPARTMENT OF THE ARMY
COALITION FORCES LAND COMPONENT COMMAND
UNITED STATES ARMY FORCES CENTRAL COMMAND
THIRD UNITED STATES ARMY
APO AE 09304

Mr. Allan MacDonell
LFP, Inc.
8484 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90211

15 MAR 02

Dear Mr. MacDonell,

I wanted to follow up your e-mail between my media operations chief, Sergeant First Class Lawrence; my media operations officer, CPT John Bryant; and yourself to make clear the discussions about your reporter, Mr. Buchbinder covering troops stationed in Afghanistan. As you may know, I am the Public Affairs Officer in charge of all the public affairs officers serving in Afghanistan and my office arranges much of the media coverage there.

As Sergeant First Class Lawrence mentioned, the best way to get into Afghanistan is to fly into Islamabad, Pakistan and then catch a UN flight from Islamabad into Kabul. After Kabul, your reporter could hire a car and get ground transportation from there. Most of the Army soldiers are currently stationed in Kabul, Khandahar and Bagram. There are many stories there to cover from combat operations involving the 101st Air Assault soldiers to the Tenth Mountain soldiers and Humanitarian Assistance

efforts coordinated by the Joint Civil Military Operation Task Force soldiers serving in Kabul. At each location, I have PAOs serving there to assist you in linking your reporter with soldiers and the missions they are carrying out for their country. There are several ways to cover the soldiers' stories. Your reporter can ask to embed which means he will link up with a unit and stay overnight for several nights or for a specific mission. Or he can link up at the gate with our Public Affairs Officers and do several stories each day on different soldiers and different units. The following is the contact information for each area:

Area	PAO Officer	E-mail Address
Kabul	LTC Pete Pearse	pearsept@jcmotf.kabul.army.mil
Bagram	MAJ Bryan Hilferty	bryan.hilferty@drum.army.mil
Khandar	MAJ AC Roper	ac.roper@kuwait.army.mil

I trust that your reporter, Mr. Buchbinder will link up with one of our Public Affairs Officers when he gets in country. We look forward to working with him and thanks for your interest in covering U.S. Army soldiers.

Sincerely,

/s/ Bonnie B. Hebert
Bonnie B. Hebert
Lieutenant Colonel, United States Army
Coalition Forces Land Component Command Public Affairs Officer

EXHIBIT E
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

From: Allan MacDonell [mailto:amacdonell@lfp.com]
Sent: Saturday, March 16, 2002 1:59 AM
To: Bryant, John T. CPT ARCENT-KU PAO; davidbuchbinder@yahoo.com; rwilcox@lipsitzgreen.com
Subject: Re: Hustler Reporter in Afghanistan

Dear Captain Tom Bryant:

Thank you for your quick reply to my queries about U.S. military contacts for Hustler's reporter, who is scheduled to take the Sunday U.N. flight to Kabul.

Thank you further for alerting the Public Affairs Officers in Kabul and Bagram of Mr. Buchbinder's imminent arrival. I'm sure he will feel much more secure knowing who he should be asking for and that the officers will be expecting him.

We are eager to place Mr. Buchbinder with combat troops in Afghanistan, and we appreciate any help you can give us in situating him with the forward troops.

Sincerely,

Allan MacDonell
Editorial Director
Larry Flynt Publications

EXHIBIT F
TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE,	)
	)
Defendants.	)

DECLARATION OF MAJOR LEANNE SMULLEN

1. I am a Public Affairs Officer with the United States Army. I am currently based at the Coalition Press Information Center in Bagram, Afghanistan.

2. The Coalition Press Information Center gives journalists who are covering U.S. military operations on and around Bagram Air Base a place to work and file their stories. My current duties include facilitating media to embed with and cover military operations, answering queries from the media and arranging for interviews between soldiers and the media.

3. The statements made in this declaration are based on my personal knowledge and information furnished to me in the course of my official duties.

4. David Buchbinder, a reporter working for Hustler Magazine, arrived at the Bagram Air Base on March 18, 2002. He stayed on the base for two nights, covered various events here, and interviewed soldiers form the 10th Mountain Division and the 101st Airborne Division. He returned to the base on April 6 and conducted additional interviews. I believe he remains in the area, and we will attempt to accommodate any future requests he may have, subject to availability and security considerations that apply to all reporters.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of April, 2002 in Bagram, Afghanistan.

(original signed)
MAJOR LEANNE SMULLEN
UNITED STATES ARMY

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,	)
	)
Plaintiffs,	)
	)
v.	) Case No.
	)1:01cv02399
	)(PLF)
	)
DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE,	)
	)
Defendants.	)

NOTICE OF FILING:
SECOND DECLARATION OF
MAJOR LEANNE SMULLEN

Defendants hereby respectfully submit a Second Declaration of Major Leanne Smullen, which simply identifies and authenticates her original declaration dated April 13, 2002.

Defendants attached an e-mailed copy of Major Smullen's April 13 declaration as Exhibit F to their Supplemental Memorandum in Support of Defendants' Motion to Dismiss (Docket Entry #27). At that time, Major Smullen was based in Afghanistan and was not able to mail or fax her declaration. She retained the original with her signature with the intention of mailing it when she returned to Kuwait several weeks later, but misplaced it during her travels. Accordingly, defense counsel requested that Major Smullen complete and mail the attached Second Declaration,

which merely authenticates the original. Due to mail delays, the Second Declaration arrived only recently.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/ John R. Griffiths
JOSEPH H. HUNT
VINCENT M. GARVEY
JOHN R. GRIFFITHS (D.C. Bar No. 449234)
United States Department of Justice
Civil Division, Federal Programs Branch
Post Office Box 883
Washington, D.C. 20044
(202) 514-4652 (telephone)
(202) 616-8470 (fax)

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached NOTICE OF FILING - SECOND DECLARATION OF MAJOR LEANNE SMULLEN was served by first-class mail, postage prepaid, upon the counsel listed below:

Roger W. Wilcox, Jr.
Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202-3857
Telephone: (716) 849-1333
Fax: (716) 855-1580

John Perazich
1701 Q Street, NW
Washington, D.C. 20009-2455
Telephone: (202) 986-7500
Fax: (202) 986-2386

Dated: June 3, 2002

/s/ John R. Griffiths
John R. Griffiths

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,	)
	)
Plaintiffs,	)
	)
v.	) Case No.
	)1:01cv02399
	)(PLF)
	)
DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE,	)
	)
	)
Defendants.	)
	)

SECOND DECLARATION OF
MAJOR LEANNE SMULLEN

1. I am a Public Affairs Officer with the United States Army.

2. Attached is a declaration that I signed in Afghanistan on April 13, 2002. At that time, I was based at the Coalition Press Information Center in Bagram, Afghanistan. I have since been returned to my assignment at Camp Doha, Kuwait.

3. I did not have access to a civilian fax machine when I was in Afghanistan. Therefore, I could only send my April 13 declaration to defense counsel by e-mail. I retained the signed copy, but subsequently misplaced it during my trip from Afghanistan to Kuwait.

4. I am submitting this second declaration to confirm that the attached document is a true and correct copy of the declaration I signed on April 13.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of May, 2002, Camp Doha, Kuwait.

/s/ Leanne M. Smullen
MAJOR LEANNE SMULLEN
UNITED STATES ARMY

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE,	)
	)
Defendants.	)

DECLARATION OF MAJOR LEANNE SMULLEN

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2. The Coalition Press Information Center gives journalists who are covering U.S. military operations on and around Bagram Air Base a place to work and file their stories. My current duties include facilitating media to embed with and cover military operations, answering queries from the media and arranging for interviews between soldiers and the media.

3. The statements made in this declaration are based on my personal knowledge and information furnished to me in the course of my official duties.

4. David Buchbinder, a reporter working for Hustler Magazine, arrived at the Bagram Air Base on March 18, 2002. He stayed on the base for two nights, covered various events here, and interviewed soldiers form the 10th Mountain Division and the 101st Airborne Division. He returned to the base on April 6 and conducted additional interviews. I believe he remains in the area, and we will attempt to accommodate any future requests he may have, subject to availability and security considerations that apply to all reporters.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of April, 2002 in Bagram, Afghanistan.

(original signed)
MAJOR LEANNE SMULLEN
UNITED STATES ARMY

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT

and

L.F.P., INC.,

Plaintiffs,

CASE NUMBER

v. 1:01cv02399(PLF)

DONALD H. RUMSFELD

In his official capacity as Secretary of Defense,

And

DEPARTMENT OF DEFENSE,

Defendants.

DAVID BUCHBINDER, being duly sworn, deposes and states:

1. I am over 18 years of age and I am presently in Bagram, Afghanistan.

2. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. Those facts which I do not have personal knowledge of I have stated upon my understanding. To my knowledge, all the facts stated in this affidavit are true and correct.

3. I am a professional journalist presently working for L.F.P., Inc., as a correspondent.

4. I have been based in Afghanistan since mid-March 2002.

5. During this time, I have been attempting to gain access to conventional combat and special forces operations in Afghanistan through appropriate military channels in order to report news of American military operations, particularly combat operations, during Operation Enduring Freedom for L.F.P., Inc., publishers of Hustler magazine.

6. On March 18, 2002, I made my first contact with US. Officials at Bagram air base.

7. I informed Major Leanne Smullen on this date that I wished to accompany combat troops in the field.

8. Major Smullen replied that Operation Anaconda was ending the next day leaving me no chance of accompanying conventional forces troops on a combat mission.

9. Major Smullen also suggested I add my name to the "Notorious List" and wait.

10. It is my understanding that the "Notorious List" is a listing of press representatives who wish to accompany American soldiers in the field and on combat missions.

11. On March 19, 2002, General Hagenbeck held a press conference at Bagram air base during which he confirmed that Operation Anaconda had been terminated.

12. I spoke to Major Smullen again on March 19th. She informed me that my name was on the list of journalists requesting access to combat missions.

13. Major Smullen also told me that other than adding my name to the list, there were no additional requirements to be granted access to combat missions and that I should stop by Bagram air base regularly in order to find out when the next operation would occur.

14. I returned to Bagram air base on March 20th and asked Sergeant Major Larry Stevens about the possibility of combat in the near future. Sergeant Major Stevens did not provide any information in that regard.

15. On March 23rd I visited the United States air base at Mazar-i Shareef and spoke with Major Overmeyer who told me he was unaware of any pending operations.

16. I visited Bagram air base from March 28th to March 31st during which time I focused on gathering information about the possibility of a spring offensive on the part of U.S. troops.

17. It was suggested to me by an individual at Bagram air base that there would be action in mid-April and that I return to the base in a week.

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18. I returned to Bagram air base on April 6th and spoke with 101st Airborne troops who were returning from an operation.

19. To my knowledge, no reporters accompanied the soldiers on this mission.

20. I returned to Bagram air base a few days later but received no new information regarding combat activity.

21. On April 14th I attended a briefing at Bagram air base but again received no new information.

22. I spoke to Major Darius Novickis, USMC, Major Smullen's replacement at Bargram air base, on April 17th and asked again how it was decided which journalists would accompany conventional forces on missions.

23. Major Novickis informed me that he makes decisions based strictly on the "Notorious List."

24. On April 17th I made a request to Major Novickis to be granted access to special forces operations.

25. I followed up with Major Novickis on April 22nd on that request.

26. He said the request was being reviewed by Major Bryan Hilferty, the head Public Affairs Officer at Bagram air base.

27. Major Novickis told me that he would ask Major Hilferty about the request at an administration meeting scheduled that evening at Bagram air base.

28. I asked Major Novickis if Major Hilferty decided which requests would be forwarded to CENTCOM for special forces assignments.

29. Major Novickis replied that Major Hilferty would discuss the request with General Hagenbeck, but did not confirm that the decision making process occurred at Bagram air base.

30. During this April 22nd conversation Major Novickis stated that "special forces is off limits."

31. However, this statement was corrected by Captain Tony Rivers of the United States Army who was present during my conversation with Major Novickis.

32. On April 23rd, I followed up with Major Novickis on my special forces request who informed me that he had discussed my request with Major Hilferty, the main PAO, and suggested that I follow up with Major Hilferty.

33. Major Novickis also informed me, "we've been instructed not to send people out with special forces and that's what we'll do until we hear differently."

34. I spoke with Major Hilferty on April 24th regarding any other requirements I needed to complete before being granted access to special forces.

35. Major Hilferty informed me that there were no additional requirements and that officials at Bagram air base were willing to let reporters accompany special forces troops pending approval from officials in the United States.

36. He noted, however that the special forces involved would likely be an observation post or humanitarian assistance team, not necessarily a combat team.

37. Major Hilferty said that he would make his decision as to which reporters would be granted the opportunity by consulting the same Notorious List that applies to conventional forces.

38. He would also make the determination based on the circulation base of the publication the reporter was associated with.

39. It was indicated to me by Major Hilferty that he would favor those reporters on the list who had been visiting at Bagram air base the longest.

40. On April 24th, I also asked Major Hilferty again whether there was anything else I needed to do to secure a special forces placement from Bagram air base.

41. He informed me that there was nothing further I needed to do.

42. On May 1st I spoke with Major Novickis about the possibility of being sent out with the troops.

43. He informed me that my placement on the list was rising.

44. He also informed me that "we reward loyalty, in terms of who's here."

45. Major Novickis also informed me that he was lobbying with British forces to have me placed on one of their missions.

46. To date, I have not been allowed to accompany American soldiers on any missions, combat or otherwise.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of May, 2002 in Bagram, Afghanistan.

/s/David Buchbinder
David Buchbinder

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY FLYNT, ET AL,

Plaintiffs,

vs.

DONALD H. RUMSFELD,

Defendant

Docket No. CA 01-2399

Washington, D.C.
May 8, 2002
11:05 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: JOHN PERAVICH, ESQUIRE
PAUL J. CAMBRIA, JR., ESQUIRE
ROGER W. WILCOX, JR., ESQUIRE

For the Defendant: JOHN R. GRIFFITHS, ESQUIRE
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Computer-Aided Transcription of Stenographic Notes

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PROCEEDINGS

THE DEPUTY CLERK: Civil Action 01-2399. Larry Flynt, et al versus Donald Rumsfeld. Mr. Peravich, Mr. Cabria and Mr. Wilcox for the plaintiffs. Mr. Griffiths, Mr. Garvey and Mr. Reyes for the defendant.

THE COURT: Good morning.

MR. PERAVICH: Good morning, Your Honor.

MR. CAMBRIA: Good morning, Your Honor.

MR. GRIFFITHS: Good morning, Your Honor.

MR. GARVEY: Good morning, Your Honor.

MR. WILCOX: Good morning, Your Honor.

MR. REYES: Good morning, Your Honor.

THE COURT: We're here on the defendant's motion to dismiss or for summary judgment, and I've read all the papers and I also issued an Order saying that each side should have 30 minutes, including rebuttal. Now, I'm not going to be like the Chief Justice and cut you off in midsentence, but since we're starting at 11 o'clock I think we should try to keep it to a reasonable period of time. Why don't you start?

MR. GRIFFITHS: Good morning, Your Honor. John Griffiths from the Department of Justice on behalf of the defendants.

Before addressing some of the specific arguments that we raise in our motion to dismiss, I would like to discuss generally the nature of plaintiffs' claim and how it has evolved since this litigation began.

Plaintiffs are no longer arguing that they have been prevented or limited in any way from sending a reporter to Afghanistan. We can all agree that the reporter that is in Afghanistan has been there I think since mid-March.

Plaintiffs also are no longer arguing that they've been denied access to U.S. ground troops. When we started this case that seemed to be the focus, the distinction between ground troops and air operation and those sorts of things, but again as the affidavits have demonstrated, plaintiffs' reporter is in Afghanistan. He's visited a couple of the bases there. He has interviewed soldiers based in those locations and has covered some events at the bases.

Third, the plaintiffs are not alleging that they have been denied or have been kept out of any geographical area within Afghanistan.

So there are a number of points in their complaint and in their briefs where they talk about being denied access to the battlefield but I think it's important to realize in this case the battlefield doesn't really exist as sort of a physical concept that they've been excluded from. They've never said that their reporter has been precluded from traveling in any part of Afghanistan or that the military has said you cannot go to this region of Afghanistan, and I think that distinguishes the case from the Nation Magazine case where that was the allegation.

THE COURT: In addition to Judge Sand being wrong, it's a different case.

MR. GRIFFITHS: That's right, Your Honor.

THE COURT: That's not my statement.

MR. GRIFFITHS: That's right. That's one of the reasons why that case can be distinguished.

THE COURT: Let me ask you a procedural question. What you said in the first two minutes is very factbased. Are we really talking about a motion for summary judgment at this point or are we still talking about a motion to dismiss?

MR. GRIFFITHS: We are talking about a motion to dismiss. All of these facts, and really I'm just describing their pleadings I think, more or less, or the positions they have taken in their papers, but all of these go to the question of ripeness and the question of the - - the political question doctrine, and under the motion to dismiss, the portion of our motion to dismiss filed under 12(b)(1) the Court can consider the affidavits.

So what plaintiffs are really left with arguing and what they have emphasized in their most recent filings is that they have a constitutional right to actually accompany U.S. troops on combat missions. So, for example, if U.S. Soldiers at Bagram Air Base or at Kandahar in Afghanistan - - say there's a unit of army soldiers that is going out on a mission, they've received some intelligence that there might be al Qaeda forces, and they're going to go out on a mission to track down these forces and engage them in combat. It's the plaintiffs' argument that they have a constitutional right to be notified of that mission, to be invited to come along with the soldiers when they go out on that mission, that they would have a constitutional right to a seat on the helicopter or the Humvee and that they would have a right to actually be there if and when there's an exchange of fire. And I think it's important when looking at each of the arguments we have raised, to keep in mind the unique and really unprecedented nature of that claim.

So, turning first to the - -

THE COURT: Have there been - - have there in fact been reporters that have accompanied troops in combat?

MR. GRIFFITHS: Yes, there have, Your Honor. We cite, I believe it was in our reply brief if not our original brief, a couple of articles that the reporters filed during the Anaconda Operation where they did go along with the troops there and reported on some of the combat operations there.

THE COURT: So essentially it may be that in some circumstances that the military on the ground would say to the reporters, yes, you can come along, but one of your fundamental arguments is that there's no constitutional right for that.

MR. GRIFFITHS: That's right, Your Honor. The very fact that the military may decide in some circumstances that a reporter can go along in a particular motion doesn't mean that that decision is of a constitutional dimension.

THE COURT: And I'll ask Mr. Cambria this question, too, but as I read the papers nobody is suggesting that Mr. Flynt's reporters are treated differently from other reporters. Is that right?

MR. GRIFFITHS: That's my understanding, Your Honor. There's certainly been nothing in the pleadings or in Mr. Bookbinder's affidavit which was filed yesterday that suggests that he or other plaintiff-reporters have been treated in any kind of discriminatory way or any kind of unfair way compared to other reporters, and I think that's just representative of how this case has evolved. And the reason we say that the case is not ripe is because, number one, the facts are very much in flux as demonstrated by the

affidavit that was filed yesterday and, number two, that the Department of defense has never denied plaintiffs' requests.

Even if you go back to the very original requests in the fall when plaintiffs wrote to Assistant Secretary Clarke and asked her for an opportunity to cover ground troops, when Miss Clarke wrote back she said, well, at this moment the only ground troops are Special Operations Forces and it's particularly difficult for us to have reporters go along on those missions but we're trying to come up with some ways in which the media can get some sufficient coverage and some access to those forces. And in the meantime here are the overt operations that are occurring, which at that point were air strikes, and reporters have been going along to cover those and here's the guy to contact if you would like similar access.

We all know shortly after Miss Clarke wrote that letter the situation on the ground changed dramatically and many more what I would call regular U.S. troops were placed in Afghanistan and many reporters did have an opportunity to stay with them, and for whatever reason, plaintiffs decided not to avail themselves of that opportunity. Instead they filed this case and concentrated on litigating this case and that pretty much remained the state of things in January, and it was only until after the Court denied the preliminary injunction motion that the plaintiffs wrote again to Miss Clarke and said we would like the opportunity to cover covert operations. Once again Miss Clarke wrote back and said I appreciate your interest and now we have many - - not many, but we have a number of public affairs officers who are on the ground in Afghanistan at various locations. Here are their names and e-mail addresses and telephone numbers. Give one of them a call and tell them what you'd like to do. That's exactly what happened.

As you will see with our materials that we filed, there was then an exchange of correspondence back and forth where the Department of Defense was assisting plaintiffs in their efforts to get a reporter over there and talking about what's the best way to fly to Afghanistan, whether you might need to hire a car, and what basis you might want to visit. What you might see at this place versus another place.

THE COURT: And even told them about cheap airfare.

MR. GRIFFITHS: So we would say the whole history of the case is one of the Department of Defense responding to plaintiffs' interests. As we now know, that resulted in Mr. Bookbinder traveling to Afghanistan in March, visiting the Bagram Air Base and at least one or two others, interviewing the soldiers there, and covering events.

The most recent thing we have is the affidavit filed yesterday from Mr. Bookbinder describing some of his efforts in the last few weeks to try to get a spot to go along on a combat mission. And we would contend that that affidavit really confirms what we've been saying all along, which is that the facts of this case are in flux. That Mr. Bookbinder has not been told he cannot go on a combat mission. In fact, he's been put on the waiting list to do just that. Now, it may that be there hasn't been much combat involving U.S. forces over the last month or so, and so I don't know for a fact when he'll get to the top of the list but I think he said he's moving up the list from where he was originally and - -

THE COURT: Tell me about the list.

MR. GRIFFITHS: I only know what was in the affidavit, but he said that there's a waiting list of reporters

who want to go on a combat mission. He's been placed on the waiting list and apparently he has moved up in the order. He also indicated that the military has offered to work on his behalf to try to get him access to some of the British troops that have most recently been handling a number of the operations. Certainly not something that the Pentagon is required to do but I think another indication that they are trying to respond to his request.

THE COURT: I don't want to interrupt the flow of your argument, but tell me the interplay between the mootness argument and the ripeness argument. Tell me why it's not ripe but at the same time it's moot?

MR. GRIFFITHS: It's certainly unusual, but I think what we said in our supplemental memorandum is if you view plaintiffs' claim as saying that they have a right to go and cover the ground troops which is, at least early in the litigation seemed to be what they were saying, then in that case it's moot because he's over there and he has covered the ground troops.

Now, plaintiffs in their response disclaim that and say that's not what we're seeking. We are seeking the opportunity to accompany troops on combat missions. And so given that, I would say the case is not moot, that ripeness is really - - we'll revert to that. We only raised the mootness points because we had learned that he had actually been over there and had been interacting with ground troops. And so to the extent that their claim can be viewed in that manner, then I think it is moot. But they had clarified it and said what they're really interested is in going along on a combat mission.

So, Your Honor, all of these factors demonstrate that there's no need for the Court to intervene at this stage and reach the constitutional issues that the plaintiffs have raised.

The facts are still evolving and the plaintiffs have not been denied an opportunity to go on a combat mission. And so the proper resource would be dismiss the claim, it's not ripe.

It may be that the Court never needs to reach these issues if plaintiffs' reporter, you know, in the next few weeks gets to the top of the list and goes on a mission and gets the experience that he's hoping for. Or the plaintiffs can return to Court if at some later time, you know, he says that he was denied, once he got to the top of the waiting list and that there was something improper in that denial.

The second jurisdictional point that we raise, and I'll just touch on it briefly because it really overlaps with the ripeness point, is that plaintiffs lack standing to bring their claims. And the point here is simply that standing requires that plaintiffs demonstrate an injury in fact that has been caused by the actions of the defendants. And here we would claim that whatever injury plaintiffs have suffered is the result of their own delay or unwillingness for sometime to actually send a reporter to Afghanistan. And I think this sort of emphasizes maybe - - I think this sort of clarifies the nature of the relief plaintiff is seeking.

It's not as if you write to the Department of Defense and you say you want to view combat and they give you a combat pass, a piece of paper that says you're going to view combat and you're going to go on a combat mission, and then you take that pass over to Afghanistan and you show it to the guy there and you get to go on a combat mission. It simply doesn't work that way. The first stage is obviously to go to Afghanistan and to be there with the U.S. troops and it's only at that point that an opportunity may arise that perhaps you will get to see some combat and it's only at that point that the decision can be made by the officers on the ground as to whether it's appropriate for you to go on a combat mission.

The third jurisdictional point we raise is the political question doctrine, and once again I think it's important to keep in mind here the very specific and unique nature of plaintiffs' claim. The defendants are certainly not arguing that simply because this involves a military matter, that the Court does not have the power to review it. There are any number of cases, any number of subjects where the Courts have reviewed military decisions although traditionally with a very great deal of deference. But here the plaintiffs' claims really go to the very heart of the executive authority. It involves questions about who can go along on a combat mission, who is going to be sitting on the helicopter or sitting in the Humvee, who is going to be there on the scene if there's a fire fight and who is going to make the decision as to whether having a civilian along will pose too great of a danger to soldiers or perhaps risk the mission's success. And we would contend that those are exactly the kind of issues that really go to the heart of the discretion that's committed to the Executive Branch. And moreover, those are exactly the kinds of issues that are beyond the expertise of the judiciary.

Questions involving security of troops and whether a mission can succeed if a reporter goes along are really not questions that, you know, we can assess here in Washington but can only be assessed by the military commander on the ground.

And so we would say this is really a fundamental case of a claim that strikes at the heart of executive power in the time of war and it's not appropriate for judicial review.

THE COURT: The plaintiffs say, I believe, that even if you're right on one or more of these issues with respect to certain claims, that certain of their other claims would survive, and I don't have clearly in my mind, count one, count two versus count eight or whatever. Maybe you want

to address that unless you want to wait until you hear what they say, but I think it's in their papers.

MR. GRIFFITHS: I can certainly address that now. I don't recall the exact counts either but I think it's essentially the distinction between their as-applied challenge and their facial challenge. And what plaintiffs argue, I believe, is that even if they have not been able to demonstrate that the Department of Defense has applied their media-access policies in a way that violated the First Amendment, they nevertheless can assert a facial challenge to those policies. And there are several reasons why the Court should not entertain that challenge.

First of all, the same jurisdictional points we raise in terms of ripeness and political question would apply to those points. Now, we have recognized in our brief that a facial challenge by its very nature is not a not as susceptible to a ripeness point because it doesn't depend on the facts of the application. But nevertheless both ripeness and standing have prudential elements to them. And we have also argued that under the Declaratory Judgment Act the Court retains discretion as to whether to provide declaratory relief.

So under any of those principles the Court still could conclude that even if as a formal matter their facial challenge has met the requirements of Article III, as a prudential matter the Court should decline to entertain that action until more concrete specs develop. And that's similar to the holding in Nation Magazine.

Obviously we disagree with Nation Magazine on a number of respects, but there the Court found the case was not moot but nevertheless declined to enter declaratory relief, using his discretion.

So we would say that the Court should deny the facial claims or deny to consider them at this time for that reason. Even if Your Honor were to consider those on the merits, there are reasons why they should be rejected at this stage on a motion to dismiss. The line of cases plaintiff attempts to rely on all involved recognized First Amendment freedoms of expression, applications for freight permits, application for newspaper distribution. Those sorts of things. There's not - - the plaintiffs have not cited a single case, and we are certainly not aware of one in which the Court has applied that type of analysis to an access claim. It could have theoretically in the prison access cases or even the courtroom access cases, it could have said, you know, they could have relied on the Shuttlesworth line of cases and said does this decisionmaker have too much discretion over a recognized First Amendment freedom, and that has never occurred.

In fact, that's there's one case, I believe it's Greer versus Spock which was a military base access case where the plaintiffs argued that the Court should apply Shuttlesworth and asked whether the military commander has too much discretion to deny a request to engage in First Amendment activities, and the Court rejected that and instead recognized the historical power of military commanders to deny - - to control their area of command, to deny people access to military bases.

And that leads to my second point, which is that none of the cases plaintiff attempts to rely on deal with military matters where the Courts have traditionally applied a much higher level of deference. If you consider the circumstances here, the reasons for that are clear. If someone is applying for a parade permit it's much easier for a Court to oversee that and to assess what standard a local official should apply when deciding on that permit. It's quite a different thing to cabin the discretion of a military

commander in a battlefield situation as to who can accompany his troops into battle. I would say that's really apples and oranges and there's strong reasons not to apply that line of authority here.

So for those reasons, the facial challenge fails even if the Court decides to reach that issue.

In additional to the facial challenge, I'll circle back for a moment to the as-applied challenge. Plaintiffs have claimed that they have been denied access and that has been a violation of their First Amendment rights, but the Court should deny even if the Court reaches that issue on its substance, it nevertheless can dismiss the claim at this point under 12(b)(6) because there is no First Amendment right to accompany U.S. troops on their combat mission.

The Supreme Court has said several times, although the Government is limited in its ability to restrict First Amendment expression, it does not have an obligation affirmatively to assist reporters, for example, in their reporting activities.

So again I think the distinction here is important because the United States has not said they cannot go to Afghanistan and the military has not precluded plaintiffs from any particular region in Afghanistan. What we're talking about here is accompanying troops on a combat mission. And we would say that that is exactly the type of affirmative assistance that is not required. It's simply a question of how the military is going to utilize its own information and its own resources, and there's no First Amendment issue there because it does not implicate the First Amendment rights because it's solely a question of the Government's own operations and it does maintain discretion over those operations, particularly when you're talking about military operations in a time of war.

And I think that's where the military base cases are really relevant. Here you have a long line of authority where the Supreme Court has said that military commanders can exclude people from their area of command, even if it's occurring during peacetime and even if it's occurring here in the United States. And the Court has said that military bases are places to train soldiers, not to provide a public forum. And they you have on the other hand the D.C. Circuit in JB Pictures where it said it recognized that tradition of military bases not being open to the public, and it said that that tradition supports a decision by the military not to allow the press onto Dover Air Force Base in order to see the bodies of servicemen coming back from the Persian Gulf War.

So I think it would make little sense to say on the one hand the military can exclude the press when it's training the soldiers and on the other hand it can exclude the press when the bodies are being returned from a conflict but somehow the military loses that authority in the middle when the soldiers are actually overseas engaging in the very combat that they've been trained to perform. The conclusion really should be just the opposite, that it's at that middle stage that the discretion of the Executive Branch is the highest, and the interests in protecting the lives of its soldiers and the interest in actually winning the war that it's fighting are the greatest.

So once you look at those two bookends that have been recognized by the Supreme Court and the D.C. Circuit we would say it would certainly be a dramatic departure to say during an actual combat situation it would be a First Amendment right to sit next to one of those combat forces and go along when they're on one of these missions.

The plaintiffs nevertheless attempt to rely on the cases involving access to criminal trials, the Richmond

Newspapers and Globe Newspapers. And it's really difficult to imagine two settings more different than the criminal trial courtroom and a battlefield overseas in terms of the nature of the environment and the type of control and the decisions that have to be made in terms of who can accompany soldiers. And in the Richmond Newspapers case Justice Stewart pointed this out, and he said that courtrooms, in conspicuous contrast to military bases, are generally open to the public. And again we would say if a military base can be closed to the public and the press, then certainly the helicopter and the Humvee and the actual unit who is on a combat mission, that the military can say that the public and the press have no constitutional right to go along in those types of circumstances.

And the second point that I think distinguishes the Richmond Newspapers and Globe Newspapers line of authority is the nature of military combat and the difficulty of applying the kind of historical analysis that was used in those cases. I think the JB Pictures case mentions this. It says, "The military is not subject to a one-way ratchet, in which any new restriction on access becomes a new constitutional minimum." And here when you have changes in both military and media technology, you know, what was an appropriate level of press access in World War II or in Vietnam may not be an appropriate level in a war against terrorism or a war where you have instant communications or, you know, firepower that may make it difficult to distinguish friend and foe. So there are plenty of reasons why it's difficult to apply that type of historical analysis, and the military has to maintain that discretion to fight the current war and to make judgments based on the situation that it currently faces.

The final point I'll make, Your Honor, is just that even if the Court were to recognize a First Amendment right of access here it still would not be absolute and the Court

would still have to consider whether the governmental interests were sufficient to outweigh that. And we would say in the military context where Courts have always shown a great deal of deference, the standard there would not be strict scrutiny but rather the Government would simply have to demonstrate that their policies were reasonable and reflect a legitimate Government concern. And here I think there's no question it's reasonable to want to protect U.S. soldiers and it's reasonable to want to increase the chances of succeeding on your missions, and that the military has struck the right balance by saying we will provide open, independent reporting when we can but that has to be subject to our security considerations.

So for all those reasons, Your Honor, we would ask you to dismiss the complaint.

MR. CAMBRIA: Good morning, Your Honor.

THE COURT: Good Morning, Mr. Cambria.

MR CAMBRIA: I would like to begin, Your Honor, if I might, by indicating that it is not my desire to be drawn into defending an argument that I've never made, and Mr. Griffiths today, for example, says that we are asking for access to Humvees and helicopters and all the rest of it. We've never done that at all. Our paragraph where we asked for our relief says simply, "A judgment declaring," this is on page 28 of our amended complaint, Paragraph A, "A judgment declaring that the First Amendment to the Constitution guarantees the right of the press to gather and report information concerning the activities of American military forces on the battlefield, including overt combat operations, subject to reasonable and necessary regulations intended to protect the safety and security of both the journalists and those involved in the operations, as well as the secrecy and confidentiality of information whose

dissemination could endanger United States soldiers or allies or compromise military operations," which means it may very well be that in each and every case we may be denied access because of the circumstances but it would only be against the backdrop of a recognition, number one, that we have a constitutional right of access which is qualified, and it's qualified by narrowly tailored circumstances which justify the Government interests. And that's all we've ever asked for, and it may very well be that in certain combat situations we will be denied access but we will be denied access in a constitutional fashion. In a fashion where it is recognized that we have a qualified right. That there are summarily tailored circumstances which will exclude us, and we understand that. And that may be in helicopters and Humvees or whatever. But at least it will be done in the context of the Constitution.

The way we begin here today from the standpoint of the ground rules, the way I understand them, of a motion to dismiss, trying to prevent us from even having discovery and putting our case together and developing our facts, we start off with the assumption and recognition that the allegations we've made are deemed to be admitted. That, in addition, all the inferences that can be drawn are deemed to be those in our favor. And I submit that based upon that we established the following issues which are clearly ripe.

Number one, Mr. Griffiths has gone on and on today, making statements about what's happening in Afghanistan and what the battle situation is like and all the rest of it. We deny all of that and we have denied all of that and we've never for a moment indicated that we've changed what we've requested or the focus of what we've requested. We've asked to have access by virtue of the Constitution to battlefield coverage. That's what we've asked for. And all of these statements about what's happening and you realize how this operates and that they've had access and the rest,

we've denied it all. And indeed Mr. Buchbinder's affidavit has said he still has not been granted access in any way. And that's a matter that would be part of our case, would be part of our discovery, part of our proof.

What we do know is as follows: That the Government has declared in no uncertain terms that we have no constitutional right. And that means that presumptively when they make a determination each time we make a request, each and every time, that determination presumptively is based upon, number one, their belief that we have no right of access, number two, that there are no narrowly tailored standards which they have to follow, that there is no standard that their discretion has to meet, that there is no timetable in which they have to make a determination regarding our request. And that indeed they are free to either accept, reject, rebuff, avoid, or what have you, each and every request.

At a minimum the Clarke responses avoid ever answering the request. At a maximum from the standpoint of assuming the best interferences from the standpoint of the plaintiff, she has denied our request. And indeed that would await development of a record by virtue of discovery.

When we look at the Herbert case out of this Circuit, D.C. Circuit and the Collins case, those cases say that it may indeed be improper to decide a 12(b)(1) motion concerning jurisdiction before discovery has been conducted. Especially where at least in this situation the Government is claiming that there are so many different divergent factual issues.

The Court can always visit the issue of jurisdiction. After the record is fully developed Your Honor is always free to say, hey, you know what, I don't think there's an issue here. The case is out. But in the meantime we are

sitting here with a very ripe issue, and that is we have asked for access and we have asked for recognition that the Constitution grants us access. And the Government has said there is no such right. We are bound by nothing. And we can guide ourselves by nothing. Each and every time.

And I think, Your Honor, that what that does is that that ignores what really was said in the Richmond case. And that is - - the Government has cited Houchins and Saxbe and some of the others, but in the Richmond case as Justice Stewart points out in his concurring opinion there, he says for the first time today we have recognized the right of access. It depends upon the circumstances. We have alleged here that historically battlefields have been open for coverage by the media. And we know that's true. But we are - - and we are certainly in a position, we believe, to prove that. History teaches us as to all the detailed coverage of all the battles up to the time of Vietnam. It's not until right after Vietnam that actions such as this action had to be filed, an issue which is occurring and recurring without redress. And the only reason why it was voided in the prior two cases was because the battles ceased. And that was it. Well, it hasn't ceased here. Each and every day Mr. Buchbinder and others are there and the Government is treating them as if they have no right to be there. That they're only there as a result of Government largess.

And it seems to me that is an imminently ripe issue at this point in time because whichever way the Court rules on that issue, it will indeed have an impact, a remedial impact. It will either tell the journalists that they have a constitutional right of access, subject to obviously narrowed conditions or it will tell the Government that they are correct and there is no right of access, period. And we are not and never have asked this Court to be involved in the minutiae of running a battlefield. We have only asked for, and indeed I think the Richmond case sums up best the kind

of Order that would be the one that we would feel would be appropriate, basically in the Richmond case the Court said in their footnote 18, "We have no occasion here to define the circumstances in which all or part," there a criminal trial, "of a criminal trial may be closed to the public. But our holding doesn't mean that the First Amendment rights of the pubic and representatives of the press are absolute." Just as the Government may impose reasonable time, place and manner restrictions on the use of its streets in the interests of such objectives as the free flow of traffic, et cetera, so may a trial judge in the interests of fair administration impose reasonable limitations. We're not asking for any declaration beyond that by this Court. It's simply a matter of saying, however, to the Government, when the media comes to you and asks for access, you must be guided by, one, a realization that the Constitution grants access where we demonstrate historical access and so, on which would be a matter of proof which we have submitted and alleged, and I submit, Your Honor, for purposes of this motion that should be accepted. And in addition say to the Government you must if you deny access, do it in a narrowly tailored fashion. And if they don't then that will await some day when that particular event occurs to decide if in that circumstance it was narrowly tailored or not narrowly tailored.

And to say that the facial challenge - - they have to add - - they have to admit that the ripeness doctrine doesn't even apply to the facial challenge. They say, well, you should exercise discretion under the declaratory part of it but they also have to admit that we've asked for basically an injunction in addition to a declaration concerning those rules and regulations, and so the discretion that's permitted for the Declaratory Judgment Act would not apply in the injunctive situation. Those are real and concrete.

There is no denial of the fact that they have now told us and they have admitted, this is what we apply. They

make it clear that no reporter can be involved in covering combat unless they receive a credential from them. But they have no standard for granting these credentials. That's on the face of it. That is on the face of it. That is a concrete issue.

It is a concrete issue that they have denied we have a right. It is a concrete issue that they are applying such thinking to our request. You can see that simply by reading the letters that we get in response. We will say we would like to cover combat missions and they will say you are free to interview the troops at the airport or at the air base. Or we would like to cover combat issues. You are free to watch the humanitarian drops. Hello. We are trying to cover combat issues here.

We know - - and it's interesting, I was trying to, and I wanted to make it part of - - obviously we feel we should be able to go on and have our case go forward and we should have discovery so that we can crystallize all of these and demonstrate, for example, during the course of discovery that there is no access, that there are no standards, and that in fact no reporter has covered the battle, no reporter. Today there was a reference to a couple of articles where the reporter supposedly - - that's to indicate that a reporter has covered the actual battle. When you read those articles they're clearly subject to interpretation that they interviewed the troops after they came back from a battle as opposed to the other. I don't think it's appropriate for us to be standing here talking about we think this article happened or that newspaper reports means thus and such or this video means thus and such. That's all a matter of proof.

This is an issue here as to whether or not we should have the right to go forward. Whether or not we should be in a position to take depositions, to do our interrogatories,

and the rest, to demonstrate two very ripe issues, as I've indicated, with regard to the constitutionality and the facial challenge.

When I read a number of cases that are relied upon by the Government here, Your Honor, I think it's a matter of proof as to whether or not there is historically openness on the battlefield.

As far as allegations are concerned, we made those allegations. I think we're entitled to have them admitted for the purpose of this motion. When we go forward we'll be in a position to prove that there's a vast difference between a military base where we have no history of it being open to reporting and the battlefield where we know, Vietnam or World War II and all the rest, that the actual working press was there as opposed to the military press. And I think that makes a huge difference here.

As I go through each of the issues that they raise, ripeness certainly means, you know, we clearly right now have an issue. We do clearly right now have an issue. And I've articulated that, as far as presumptively how they operate on a day-by-day basis in making their judgments with regard to us.

As far as standing is concerned, we have a genuine clash here with regard to whether we have this right or not, whether or not there are any standards they have to apply when we make these requests. And I think it's clear that as far as their 12(b)(6) motion where they would have to prove beyond doubt that there's no set of facts to support our claim, I mean preliminarily in your injunction motion you indicated, yes, there is. You may not agree that on that record that we had at that time where we were asking the Court to be proactive for us at that time on that record, but the Court does say on a more - - on a fuller record, the word

used by the Court, it seems to be that, you know, we would have the opportunity to make this case. This is an important case. We have demonstrated that it is subject to recurrence. This is the third time in ten years. I mean we're glad that it isn't the ninth time, meaning we would have had nine other wars so we're not - - you know, we're obviously not happy - - we're happy that there haven't been more occasions. But here we do have an occasion and I think that we're at least entitled to have a judgment, to go forward with regard to discovery on our issues of straight constitutional application which they've denied, and our facial challenge.

I particular - - particularly the language in the - - I pulled this out from the Herbert case, Your Honor, talking about - - let's see if I've misplaced it here. Basically the language in the Herbert case was to the effect of - - here it is, and this appears on pages 18 and 19 of the Herbert case. It says, "Indeed, this Court has previously indicated that ruling on a 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction." And even goes on to say, "In many instances it nay be necessary to hold evidentiary hearings to resolve particular facts." I know today that Mr. Griffiths went on and on about facts he claims are established from his standpoint, even though I don't believe the Government is entitled to have anything established from their standpoint on a Rule 12(b) motion. And certainly the most the cases have said is that you can take extra-pleading facts that are undisputed. And clearly we dispute all of these facts. The facts that he's relying on here today or at least alleged facts where he discusses battles and other things, we've disputed all of those.

THE COURT: I think it's probably extra-record facts that are undisputed or undisputable. If you said at noon on May the 8th it was raining outside and it wasn't, the fact that you say it doesn't mean it's a disputed fact.

MR. CAMBRIA: I agree with that, Your Honor. I think that it has to be an undisputed fact. I agree with that wholeheartedly. And each of these facts are disputed, and if we look at the nature of what he was relying on here today it's a scenario and sort of a story line, if you will, of what he thinks is going on. What's happening in Afghanistan. How people are being treated when they're reporters. What other newspapers are doing and so on. I mean those are clearly disputable and we have disputed them.

So I think that for the limited purpose that we are here to determine whether or not the case can go forward as opposed to being dismissed, and allow us to have our discovery and so on, to, you know, flesh the case out, I think we have satisfied that burden, if you will, Your Honor.

And again, I think that there's a great analogy to be drawn to the courtroom situation. Sure, of course it's not a mirror image because obviously there may be a little bit more control in the courtroom setting. So for that reason the narrowly tailored circumstances may be a little more easily tailored. But that doesn't mean that they don't exist. But it would be the same thing as if we - - if we analogize this case, and assume that I wrote to a judge and I said could I cover a trial and the judge wrote back to me and said you have no right to cover the trial but I'll let you cover the preliminary hearing. Then I came down and I covered the preliminary hearing and I said but I want to cover the trial. Well, you don't have a right to cover the trial. I have to give you a reason. There's no narrow tailored. There's no definitions. I'm not bound by anything. It's just no. And I sued at that point and the Government came in and said, wait a minute, all the other reporters covered preliminary hearings and we know a few covered some trials, and I say now how have I resolved my issue here as to whether or not I have an access right to cover that, and even if we were in a

situation where the Court said all right, you can cover today's trial and I did and there were five others that I either didn't know about, didn't have the chance to cover or what have you and again I brought my action and I said, well, wait a minute. Can the Government come in at that point and say, well, you know, we gave you a bunch of phone numbers, you could have called a lot of people and found out what these trials are but you still don't have a right to be there. What happens in that context, Your Honor, I say, wait a minute, historically trials have been covered and it's important structurally to the First Amendment because the country, the people are allowed and should be permitted to know how the judicial branch of their Government functions. I make the same argument here. It is important structurally for people to know how the Executive Branch of the Government operates.

We're not going to hamstring the Army in any way. All we're going to say is the next time there's a request you must, number one, recognize there's a right and, number two, narrowly tailor your determination and make it relatively quickly so that it will be worth something. And that's the same situation that we have here.

And finally the Court didn't say in Richmond - - and remember in Richmond and Globe and all the other cases those trials were long over with by the time those cases ever reached the Supreme Court and the Supreme Court said finally, look we didn't have our majority in Houchins, we didn't have it in Saxbe. Today we have it and today we recognize that if history demonstrates that there's an access and in addition if there's a structural component and that is it's important to disseminate this information to the country, we find a qualified right of access. If the Supreme Court hadn't done that, then all the reporters who have tried to cover trials would have been put in the same squirrel cage that the Government would have us be in now and say,

well, go knock on the doors. Try to get in. Here's a bunch of numbers. You'll get in for a hearing.

It shouldn't work that way, Your Honor. It's too important. It has always been important in our whole history to impart this information to our people and then all of a sudden 20 years ago it was cut off and now it's only supposed to be at largess of the Government.

I submit, Your Honor, that is the real issue. We've crystallized that issue to this point, to the point where the Court can say you either have a right or don't and these are the rules, or you do not have a right, so don't worry about the rules. That's before you now and I submit there's nothing that's not ripe about that, Your Honor, and we should be able to go forward, make our record, have our discovery. You can always reserve on jurisdiction and say we were wrong and we have no jurisdiction after we have a fuller record, to use the Court's word.

Thank you.

MR. GRIFFITHS: Your Honor, I would just like to make a couple of points.

First of all, regarding the 12 (b)(1) standards and whether the Court can consider the materials that have been submitted in the course of the litigation. I'm sort of surprised to hear plaintiffs' counsel say today we dispute everything. Maybe that's the best course to take if you're trying to resist a motion to dismiss. But the materials that we've relied on in support of our motion have consisted of the letters that they attached to their pleadings which could be considered even aside from - - they're not even extra - - they're not even beyond the pleadings because they were attached to it and so they can be considered, in any event. And I think it's well settled that if you attach something to

your pleadings that contradicts what you have alleged in the actual complaint the Court has the authority to look at the materials you have attached and see if there is an inconsistency there.

Moreover, we've relied on the e-mails and letters that have gone back and forth between the parties. And plaintiffs may say now we dispute everything, but they haven't disputed the authenticity of those communications, and those communications demonstrate that the case is not ripe because DOD has been responding to their requests. And finally we're relying on their own affidavit which indicates that their reporter is on the waiting list to go on a combat mission.

So I would say when you look at the universe of materials we're citing here, this clearly falls within the 12(b)(1) standard and the Court can consider those.

Second, I think that the plaintiffs' arguments here today really demonstrates the theoretical nature of their claim. I mean I think at bottom plaintiffs are seeking an advisory opinion from the Court that reporters have qualified First Amendment rights to accompany soldiers on combat missions. But you cannot simply assert that argument and ask for an advisory opinion from a District Court without some facts that create a ripe controversy. And the facts in dispute certainly cannot be the fact that the parties have a legal disagreement. If they write to the Department of Defense and say we have a First Amendment right to cover these operations, and the Department of Defense says, well, you know, go over there and you can put your name on a list, the very fact that the Department didn't come back and say we agree with you on the underlying legal issue, that surely cannot be enough to create a ripe controversy.

We obviously have disagreed on whether there's a First Amendment entitlement. The Government may disagree with private parties in many respects about whether they have constitutional entitlements, but unless there are underlying facts that create a case in controversy, there's no occasion for this Court to consider that dispute.

THE COURT: How does somebody ever get this issue resolved, in your view? Basically they're saying we think there's a First Amendment right of access, qualified, reasonable rules and regulations. The Government still hasn't given us that access even though they've done some things, and their rules and regulations are not reason, the DOD directive or guidance or whatever. And so, in effect, even though, and I don't want to put words in Mr. Cambia's mouth because he said Secretary Clarke sent letters as a denial, but in effect, one of his arguments would be you're trying to moot out the case or say that it's not ripe by - - through giving something but not everything but preserving your right to say it will always be within our discretion to decide what that something will be. And that suggests that there's no way that anybody will ever get a right of access because what you're doing, I'm not trying to be pejorative, but what you're doing is simply not as blatant as what was done in the Richmond case by saying you just can't get into this trial at all.

MR. GRIFFITHS: Well, I think that goes back to the nature of that type of request where you're asking for an opportunity to accompany soldiers on a combat mission and you write to Assistant Secretary Clarke here in Washington. As I explained earlier, it's not as if you're granted a combat pass and you take it over to Afghanistan. The very first step you need to take is to be there in Afghanistan. And it's our contention that questions about who can accompany someone on a combat mission can only be made by the people on the ground based on their assessment.

I would say in a purely theoretical case, maybe similar to Nation Magazine, let's say that the military had said we're cordoning off of all Afghanistan and you can't even go into that area and plaintiffs wrote and said we'd like to go over to Afghanistan and they wrote back and said I I'm sorry, reporters are not allowed there. Whether that will be a violation of the First Amendment obviously is a different issue, but I would say there you would have a ripe controversy.

THE COURT: So, your argument, in part, let me paraphrase what I think may be your best argument, is this, we - - we're not recognizing a First Amendment right of access. We think the Nation Magazine case was wrong. And we can't be forced to concede that point. We're not going to concede it. However, as a practical matter we'll provide a right of access, and it's a qualified right, or provide access, but it's qualified. And it's qualified by reasonable and articulated and articulable standards and guidance and DOD directive, but even if the guidance and standards were written a little differently it would still have to be up to the commanders on the ground who are actually in the real world.

So whether you call it a First Amendment right of access or an Executive Branch discretionary right of access, we do have standards, we do have guidelines, and we're not doing anything different from what we would do, obviously if the Court told you to do it differently - - but you would hope that even if I or some other judge said there's a First Amendment right of access, that the guidance, the regulations, the standards would be acceptable as reasonable and it would always be recognized that in any given situation the commander on the ground has to make those judgments anyway, so long as he's not, not to use, again, words of art but arbitrary and capricious and et cetera.

MR. GRIFFITHS: That's correct, Your Honor. I think that's a fair characterization. It may be that the directive that has been issued by the Department of Defense which as you may recall was issued in consultation with a number of news organizations following the Persian Gulf War, we have contended that that directive would withstand scrutiny even if there was a recognized First Amendment right, but our point today is that even if the parties may sort of come out to the same result which is that access is determined based on, you know, a balancing of the military's express commitment to try to provide open, independent reporting when it can, weighed against the security considerations, even if that's ultimately the same result you get in your case, the difference is that in defendant's view that's not a constitutional requirement and also it's not something that is subject to judicial oversight or judicial review.

So when plaintiffs talk about having narrow standards imposed and, you know, if the military denies access in a way that violates the narrow standards that they believe are appropriate, then they would be able to get the relief of the Court, we would say that that is not available. And that sort of goes back to our political question arguments.

THE COURT: And then the question I asked a few minutes ago about how would this issue ever get resolved. I don't know if I cut you off, but certainly one hypothetical that you said and there may be others, I don't know, is if somebody came to Court and said we believe there is a First Amendment right to access to the war in Afghanistan or to the combat aspects of the war in Afghanistan and they won't let us in Afghanistan at all, the closest we can get is, I don't know my geography very well, but Uzbekistan, or Kazakhstan, then you might concede that somebody in that position might - - would survive a motion to dismiss.

MR. GRIFFITHS: On the ripeness ground, yes. There still would be political question issues and there still may be no First Amendment right in that circumstance. So we certainly would not - -

THE COURT: You're not conceding the First Amendment right.

MR. GRIFFITHS: No.

THE COURT: But Mr. Cambia's primary argument this morning, I think, is that the case shouldn't be dismissed. That they ought to have a right and develop a record to show that, A, there is a First Amendment right of access, qualified, B, they've been denied it based on a comparison with what's historically happened and, C, that the standards and guidance and regulations are not reasonable restrictions. Even though he recognizes that there is a balance between access and security the way it's being done. So he's saying I ought to be able and my client ought to be able to at least test all of these concepts after discovery rather than being thrown out of Court based on a few affidavits and a few newspaper articles.

MR. GRIFFITHS: But, Your Honor, there still is an obligation to present the Court with an actual case or controversy, and in this case they have simply not fulfilled that burden. And so, you know, they cannot simply come to the Court and say, you know, this is an interesting issue or this is an important issue and therefore we would like the Court to rule on the constitutionality because the defendants refuse to recognize our constitutional argument. That is insufficient. The Court still needs to determine whether as a factual matter there's a case or controversy that is ripe for review. And of course I think the political question doctrine would apply in any event. Regardless. If there's a ripe controversy the Court could still at this time determine that

it's a political question and therefore the court does not have the authority to review it. And one thing that I think emphasizes that is when plaintiff talks about their desire to take discovery in this case in order to support their claims I think it's important to consider the type of discovery that they're contemplating, and they said that they want to take discovery about the nature and extent of the overt operations which have taken place and which are currently, going on in Afghanistan and possibly elsewhere, and they want to take discovery on whether the presence of such correspondents would pose a danger to actual United States combat personnel undertaking military operations, and we would contend that that really crystallizes the political question doctrine and underlies the fact that this would involve the kind of oversight and the kind of interference with military decisions that is not appropriate in a time of war.

Thank you, Your Honor.

THE COURT: Mr. Cambria, do you want to respond to any of that? You actually took less than your half hour.

MR. CAMBRIA: Your Honor, as far as what we dispute, we obviously dispute their version of what's going on in Afghanistan. How we've been treated. We dispute whether we've been given access. We dispute that the Government's handled our request in a timely manner. That's demonstrated by the letters. We dispute the Government has used narrowly tailored standards to decide our request, and that's quite clear from the letters, especially when the inferences are drawn in our favor. We dispute that the Government's refusal to provide access is justified. We - - you know, the scenario that we spun about if they roped off the area and said - - those are the easy cases, it's discovery that turns cases into cases like those. It is when you can demonstrate through discovery that no one has

gone over, that no one has covered combat, that the only access has been with regard to interviewing troops on the base or that there are no standards or that they differ from person to person.

The Executive Branch of the Government should not be able to be immune from the light, if you will, the sunlight that the media shines on the inner workings of Government. The other branches clearly are not immune from that. We know that. And the Executive Branch should not be. And that's basically what's happening here. They're saying we should be able to give you a little taste and then come in and say, see, we really are trying to give you access.

This whole thing isn't ripe. It's moot. It doesn't get any better than this, because they won't allow it to get any better than this. They will give us dribs and drabs, from their letters. You can see just from the language of the letters it's like you're in two different worlds when you look at these. The words, the patent phrases and so on that are in there, the Governmentspeak, if you will, that is in the letters, you have to be able to get beyond that.

It seems to me that from the standpoint of whether this case should be dismissed or whether we should be able to make a record on this case and then come here for relief, I think we have achieved that hurdle, with all due respect, because we've shown, shown we really do have an issue here. It is ripe. They are denying totally to us that we have this right and they are denying totally that they have any restrictions whatsoever. We're there. We're asking to cover the battle. It doesn't get any more contentious, if you will, and ripe than that. And they've made it clear without any camouflage, that they say we have no rights. You'll get what we give you. That's it. That's where we are.

And I submit that after Richmond was decided the whole playing field changed with regard to press access when it comes to the Executive Branch and I submit, Your Honor, it should not be dismissed and we should be able to go forward.

THE COURT: Okay. Thank you all very much.

MR. CAMBRIA: Thank you, Your Honor.

(Proceedings concluded at 12:10 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcription from the record of proceedings in the above-entitled matter

/s/
Official Court Reporter

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT
and
L.F.P., INC.,

Plaintiffs,

v. CASE NUMBER 1:01cv02399 (PLF)

DONALD H. RUMSFELD
In his official capacity as Secretary of Defense,
and
DEPARTMENT OF DEFENSE,

Defendants.

PLAINTIFFS' MOTION FOR ISSUANCE OF A DECISION ON DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Plaintiffs, Larry Flynt and L.F.P., Inc., by and through their attorneys, John Perazich (attorney of record), and Paul J. Cambria, Jr. and Roger W. Wilcox, Jr. of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP, respectfully move this Court for a decision on defendants' motion to dismiss the amended complaint and in support thereof state as follows:

1. On November 16, 2001, plaintiffs filed their original complaint with this Court.

2. On January 17, 2002, plaintiffs filed an amended complaint with this Court.

3. Generally, the amended complaint alleges that the defendants have denied plaintiffs their First Amendment rights of press access to the battlefield and that Department of Defense regulations governing requests for press access are facially unconstitutional.

4. By motion filed on or about February 8, 2002, defendants moved to dismiss the amended complaint or, in the alternative, for summary judgment.

5. On or about March 1, 2002, plaintiffs filed a memorandum of points and authorities in opposition to defendants' motion to dismiss or, in the alternative, for summary judgment.

6. Defendants filed a reply memorandum on or about March 12, 2002.

7. The hearing on defendants' motion to dismiss originally scheduled for March 28, 2002 was rescheduled by the Court for April 30, 2002.

8. With the Court's leave, defendants filed a supplemental memorandum in support of their motion to dismiss on or about April 18, 2002.

9. Plaintiffs filed a memorandum in response to defendants' supplemental memorandum on or about April 25, 2002.

10. At plaintiffs' request, the Court rescheduled the motion hearing from April 30, 2002 to May 8, 2002.

11. Oral argument of defendants' motion to dismiss or, in the alternative, for summary judgment was heard by the Court on May 8, 2002.

12. More than two months later, having not received a decision from the Court on defendants' motion to dismiss, plaintiffs sought permission to submit a proposed limited discovery schedule pending the Court's decision on defendants' motion.

13. Plaintiffs requested limited discovery while the Court was considering its disposition of the motion to dismiss because plaintiffs' press access claims are obviously time-sensitive and plaintiffs desired to engage in discovery while Operation Enduring Freedom was ongoing.

14. Defendants opposed plaintiffs' limited discovery request and the Court denied plaintiffs' application in an order filed August 29, 2002. In particular, the Court concluded that "it is premature to grant plaintiffs' discovery request until the Court decides defendants' motion to dismiss, which raises (among other issues) the Court's jurisdiction over this matter."

15. Now, more than two months later, the Court still has not issued a decision on defendants' motion to dismiss or, in the alternative, for summary judgment.

16. Plaintiffs respectfully recognize that the Court has other cases besides this one on its docket and that judicial decisions on issues of the magnitude of plaintiffs' claims and the Government's defenses necessarily require thoughtful deliberation.

17. But, as the Court observed in its Memorandum Opinion and Order denying preliminary injunctive relief, "[w]hether defendants are doing enough to satisfy the First Amendment or the Due Process Clause are questions that will have to await the development of a fuller record." See Memorandum Opinion and Order at p. 5.

18. Six months have now passed since oral argument of defendants' motion without a decision on the motion or even the beginning of development of the fuller record this Court deemed necessary to a determination of whether defendants are meeting their constitutional obligations. During this six-month period of time, plaintiffs have been unable to advance this litigation and ultimate vindication of their First Amendment interests and the Court has denied them even the opportunity for limited discovery.

19. During the past six months, Operation Enduring Freedom has continued, particularly in Afghanistan where the United States military forces remain and conduct operations. Similarly, the challenged Department of Defense press access restrictions and the constitutionally invalid press access decision-making scheme continue to be applied.

20. Without a decision from the Court on defendants' motion to dismiss, plaintiffs are unable to move forward with a vigorous prosecution of their First Amendment rights, either in this Court should the motion to dismiss be denied or on appeal to the Court of Appeals should the motion to dismiss be granted.

21. The delay in issuance of a decision on defendants' motion to dismiss has essentially resulted in the maintenance of the *status quo* in favor of the Government and in derogation of what plaintiffs believe are established and fundamental press access rights.

22. Continued delay may also impact the ability of plaintiffs and other similarly situated journalists or media organizations to exercise their First Amendment press freedoms with respect to military operations anticipated in the near future, most notably the potential war with Iraq.

23. The fact that this case has not moved forward in the past six months has adversely affected both plaintiffs' exercise of their constitutional rights and implementation of a permissible press access scheme by defendants which would lawfully regulate press access to current and future American battlefields.

24. As it now stands, there is nothing stopping the Department of Defense from applying the same unconstitutional press access scheme to any new battlefield which may develop in the coming days or weeks.

25. Accordingly, time remains of the essence with respect to the judicial determination of plaintiffs' First Amendment and due process claims.

26. Plaintiffs hereby incorporate the Statement of Points and Authorities in support of this motion.

WHEREFORE, plaintiffs respectfully request that the Court issue a decision denying defendants' motion to dismiss or, in the alternative, for summary judgment, for the reasons expressed in plaintiffs' prior submissions and at oral argument on May 8, 2002.

DATED: November 14, 2002

Larry Flynt and
L.F.P., Inc.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY FLYNT and LFP, INC., Plaintiffs, v. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, and THE UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	Case No. 1:01cv02399 (PLF)

RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF A DECISION ON DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense hereby respond to Plaintiffs' Motion for Issuance of a Decision on Defendants' Motion to Dismiss the Amended Complaint as follows.

As the party who filed the pending Motion to Dismiss, Defendants are not opposed to the Court ruling once the Court has had a full opportunity to weigh the important issues in this case. However, Plaintiffs have offered no justification for dictating the timing of the Court's consideration of Defendants' Motion. As Defendants previously have demonstrated, Plaintiffs' First Amendment rights have not been curtailed by Defendants and the Department of Defense's press scheme is not unconstitutional. Therefore, Plaintiffs have suffered no prejudice during the Court's consideration of Defendants' Motion to Dismiss.

Accordingly, to the extent Plaintiffs' Motion seeks to dictate the management of the Court's docket, it is without basis and should be denied.

Respectfully submitted,

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November 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2002, that a true and correct copy of the attached RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF A DECISION ON DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT was served by facsimile and first-class mail, postage prepaid, upon the counsel listed below:

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No. 03-5075

Oral Argument Held on November 21, 2003
Decision Issued on February 3. 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LARRY FLYNT
and
L.F.P., INC.,
Plaintiffs-Appellants,

—v. —

DONALD H. RUMSFELD
In his official capacity as Secretary of Defense,
and
DEPARTMENT OF DEFENSE,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAINTIFF-APPELLANTS' PETITION FOR PANEL REHEARING PURSUANT TO FED. R. APP. P. 40

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INTRODUCTION

On February 3, 2004, the Court issued a decision affirming the judgment of the District Court (Friedman, J.) dismissing appellants' amended complaint. Appellants Larry Flynt and L.F.P., Inc. (hereinafter "Flynt" and "LFP", respectively) respectfully submit that this decision rests on a misapprehension of important facts and the scope of appellants' press access argument on appeal. Appellants consequently petition for a panel rehearing under Fed. R. App. P. 40 to correct the factual foundation of the Court's opinion and, necessarily, the legal result compelled by that foundation.

Appended to this petition as required by Circuit Rules 40 and 35, and the Court's Handbook of Practice and Internal Procedures, pp. 56-57, are the panel's opinion (Exhibit Tab A), the Rule 28 (a)(1)(A) certificate of parties and *amici* (Exhibit Tab B), and the Rule 26.1 disclosure statement (Exhibit Tab C).

A PANEL REHEARING PURSUANT TO FED. R. APP. P. 40 SHOULD BE GRANTED TO CORRECT THE FACTUAL FOUNDATION OF THE COURT'S OPINION

The Court prefaced its discussion of the merits of appellants' First Amendment press access claims with an explanation of what it perceived to be the scope of appellants' constitutional challenges. In particular, the Court observed that at oral argument appellants "claimed a right, protected under the First Amendment, in their own words, to 'go[] in [to battle] with the military." Slip op. at 7. Noting that the claimed right "is different from merely a right to cover war," the Court followed with this important observation:

> The Government has no rule—at least so far as Flynt has made known to us—that

> prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to the region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DOD rule.

Slip op. at 7-8.

The Court's conclusion in this regard is in error. As both appellants and the Government represented to the Court in their briefs, and as Enclosure 3 expressly provides, media correspondents may not report in a combat zone without Department of Defense permission. The language of Enclosure 3 was set forth in appellants' Brief on Appeal at pp. 3-4, and states in relevant part:

> E3.1.4. Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations shall make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.

Enclosure 3 to Department of Defense Directive 5122.5—*Statement of DoD Principles for News Media* (emphasis added). The Government specifically acknowledged this combat zone reporting restriction at p. 4 of its Brief for Appellees, and later explained that "although it requires that

journalists in a combat zone be credentialed by the military and that they abide by security ground rules that plaintiffs have not challenged, the Directive does not otherwise impose any specific restrictions on plaintiffs or any other member of the media." Brief of Appellees, at p. 12.

Accordingly, contrary to the Court's conclusion, a media outlet cannot simply equip a vehicle with the necessary technical equipment and drive it into a combat zone. Journalists are not free to simply wander a combat zone looking for battles. The Government unequivocally requires that reporters in a combat zone be credentialed by the U.S. military, and that they follow the rules imposed by the military under threat of expulsion from the combat zone. Thus, unless a journalist wants to cover the war from a remote location, he must obtain the Government's permission to enter a combat zone to observe battles involving American troops.

This distinction is critical. The Court's opinion presupposes that journalists have the right to enter a combat zone in search of battles to cover, but according to the Government no such right actually exists—a primary reason why Flynt sued to establish the right. At best, journalists are allowed to enter a combat zone only after obtaining the Government's permission. Once the journalist has received such permission, his activities in the combat zone are regulated by the military's ground rules for reporters. Merely outfitting a vehicle and driving through a combat zone hoping to find a battle is not, contrary to the scenario posited by the Court, lawful under the press access regulations adopted by the Department of Defense, and will result in the expulsion of the journalist from the zone where the battles he hopes to cover are taking place.

The Court's misapprehension of the facts related to these combat zone restrictions resulted in an undue

narrowing of appellants' claims on appeal. Having adopted the perspective that journalists enjoyed unfettered access to the battlefield, the Court defined appellants' constitutional challenge as requesting something more:

> With that distinction made, appellants' claim comes more sharply into focus. They claim that the Constitution guarantees to the media—specifically *Hustler's* correspondent—the right to travel with military units into combat, with all of the accommodations and protections that entails—essentially what is currently known as "embedding." Indeed, at oral argument appellants' counsel stated that the military is "obligated to *accommodate* the press because the press is what informs the electorate as to what our government is doing in war."

Slip op. at 8 (emphasis in original).

Appellants without doubt assert that paying more than mere lip service to a First Amendment right of press access to combat on the battlefield requires some accommodation of the press, at least to the extent of allowing reporters to accompany American troops during combat operations. But the degree of accommodation is just a corollary to appellants' main argument: that because the Government restricts access to the combat zone where battles are taking place, it must administer its press access program pursuant to procedures and standards that meet First Amendment requisites. Indeed, appellants' argument before the District Court and in its briefs before this Court crystallized the issue in clear terms. As counsel explained below in contrast to the Government's patent denial that <u>any</u> First Amendment right of press access to the battlefield existed:

I would like to begin, Your Honor, if I might, by indicating that it is not my desire to be drawn into defending an argument that I've never made, and Mr. Griffiths today, for example, says that we are asking for access to Humvees and helicopters and all the rest of it. We've never done that at all. Our paragraph where we asked for our relief says simply, "A judgment declaring," this is on page 28 of our amended complaint, Paragraph A, "A judgment declaring that the First Amendment to the Constitution guarantees the right of the press to gather and report information concerning the activities of American military forces on the battlefield, including overt combat operations, subject to reasonable and necessary regulations intended to protect the safety and security of both the journalists and those involved in the operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations," *which means it may very well be that in each and every case we may be denied access because of the circumstances but it would only be against the backdrop of a recognition, number one, that we have a constitutional right of access which is qualified, and it's qualified by narrowly tailored circumstances which justify the Government interests. And that's all we've ever asked for, and it may very well be that in certain combat situations we will be denied access but we will be denied access in a constitutional fashion. In a fashion where it is recognized that we have a qualified right.*

Appendix at 146-47 (emphasis added).

Appellants unambiguously argued before the court below that if the First Amendment does, in fact, guarantee a right of press access (even if it is only a qualified right), then the Government cannot license access to the combat zone via a process not superintended by constitutionally adequate safeguards. Appendix at 147-53. On appeal, appellants reiterated this precise argument. For instance, at pp. 20-21 of appellants' initial brief on appeal, counsel urged:

> . . . the ripeness issue is easily resolved by reference to a central dispute between the parties: appellants urged below that, as publishers and members of the United States media, they have a qualified First Amendment right of access to the battlefield. Respondents countered that appellants do not have this right—that press access to the battlefield is not guaranteed to any extent by the United States Constitution and exists wholly at the sufferance of the government. (Record citations omitted).[1]

Appellants repeated this primary argument later in their opening brief on appeal, particularly in regard to the District Court's reluctance to apply First Amendment licensing principles to the Defense Department's combat zone credentialing scheme:

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[1] See also, p. 21 of the Brief of Plaintiff-Appellants ("Appellants seek access by constitutional authority, which carries with it the imposition of limitations on the Government's refusal of access. What respondents offered instead was limited access at their mercy without constitutional restraint").

> The idea that a government agency that limits the exercise of protected First Amendment press rights by requiring prior approval would be subject to well-established prior restraint rules is not so novel that the District Court was justified in avoiding the issue altogether. Appellants simply urged the District Court to hold the Department of Defense to the same time-worn constitutional standards applicable to other governmental bodies that seek to restrain the exercise of First Amendment rights in advance. Indeed, the facial deficiencies alleged in Claims 4 through 7—the failure to acknowledge and protect appellants' First Amendment right of access to the battlefield; the grant of unfettered discretion to the Defense Department officials in determining whether a press access request will be granted; the failure to require a timely decision on a press access application; and the failure to provide for a prompt administrative appeal of a denial of a press access request—all have the same force and effect when applied in a scheme which burdens the exercise of First Amendment free press rights as it does in a scheme which burdens the exercise of First Amendment expressive rights.

Brief for Plaintiff-Appellants, at p. 31 (citations omitted).

Appellants reiterated the heart of their claim in the Reply Brief for Plaintiff-Appellants. Noting that the key issue is whether the Department of Defense can unilaterally declare battlefields to be off-limits to reporters, appellants addressed the Government's mischaracterization of their argument:

> Contrary to the "straw man" argument set up by respondents, appellants have never maintained that the First Amendment obligates the military "to act as a tour operator for the press by shepherding journalists to the battlefield and introducing them into the fighting ranks" (Appellee's Brief at p. 24). Properly characterized based on the record before the District Court, appellants simply asked that their correspondent be permitted access to the battlefield and that he be allowed to report on the combat activities of American ground troops. Appellants repeatedly emphasized that they would comply with any operational security requirements the Department of Defense deemed necessary (A 28-29, 31, 84-86). No request for "shepherding" or "tour guides" was ever made by appellants, and such a suggestion defies the record.

Reply Brief for Plaintiff-Appellants, at pp. 9-10.

On the record and briefs before this Court, the heart of appellants' First Amendment argument is repeatedly stated: that because the Government restricts press access to battlefields in the combat zone, it has a constitutional obligation to administer its reporter credentialing program in a manner that comports with the standards applicable to prior restraints on the exercise of First Amendment rights. While counsel did acknowledge at oral argument that appellants believe that the scope of the qualified First Amendment right of press access to the battlefield also encompasses the minimal assistance necessary to effectuate the right—such as permission to travel in military vehicles—such additional considerations implicate the *extent* of the qualified right of access appellants advocate rather than the

fundamental question of its *existence* that lies at the core of appellants' claim.[2]

Appellant respectfully submits that the Court's decision is premised on both the erroneous belief that journalists can travel the combat zone at will, and on the inaccurate reframing of appellants' claim that results from the factual misapprehension. Obviously, arguing that the Government restricts access to combat zones and wrongly refuses to recognize that members of the press have a First Amendment right to observe battles involving American troops is quite different from arguing that journalists are free to wander the battlefield, but have a constitutional right to transportation, housing, and protection from the military. While the Court correctly notes that appellants contend that, realistically, effectuation of a First Amendment press right to cover battles will necessarily involve the military allowing reporters to travel with troops going into battle—a concept that is not novel in either theory or practical application—this is but an extension of appellants' main argument: that because the Government restrains reporter access to the battlefield, it must do so in a manner that comports with the safeguards traditionally imposed to protect First Amendment rights from transgression by Government officers.

In this case, appellants have urged the Court to rule that Government restraints on the right of the press to

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[2] Counsel's office contacted the Clerk's Office to arrange for access to either the audiotapes of the oral argument or a transcript of same. Counsel has been advised that the tapes cannot presently be located; accordingly, a transcript is also unavailable. Consequently, the representations made herein are based on counsel's best recollection of the appearance before this Court on November 21, 2003.

observe and report on battles involving American troops must be grounded in a legitimate and constitutionally cognizable justification, and that any system of "credentialing" or licensing reporters must operate under First Amendment rules preventing arbitrary, capricious or discriminatory application, assuring timely decisions on press access requests, and allowing prompt administrative appeals of access denials. Of course, appellants do not expect that such a process would operate in the military context in the same way it works in civilian life, but even minimum First Amendment standards must still apply. However, the Court's misapprehension that journalists are permitted to wander the combat zone at will looking for battles, and its re-casting of appellants' argument to one seeking to have a more burdensome constitutional obligation imposed on the Government than that actually sought by appellants, cause the panel's decision to turn on factors not involved in this case.

For example, based on these misapprehensions the Court described appellants' facial challenges as follows:

> The facial challenge is premised on the assertion that there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions. There is nothing we have found in the Constitution, American history, or our case law to support this claim.

Slip op. at 9. While appellants clearly argued that the First Amendment gives reporters a right to cover battles, and that such a right necessarily entails the Government's permission to be in the combat zone and the reporter being made aware

of where the combat zone actually is, the Government's degree of accommodation of journalists within the combat zone is a question answered by circumstances. As counsel explained to the Court during oral argument, appellants believe that, under most circumstances, a meaningful right of press access to combat will require that reporters be allowed to travel with troops during combat operations, but the mode or method of such travel need not be a constitutional issue. Of course, appellants' arguments have been advanced without the benefit of discovery, so denial of the Government's motion to dismiss will allow development of the factual record in this regard.

The Court's disposal of appellants' as-applied challenges was also affected by this misapprehension of the facts. Despite the Court's conclusion that there appeared to be nothing preventing a media outlet from simply outfitting a vehicle and using it to travel the "region of conflict", Slip op. at 7-8, Enclosure 3 to Department of Defense Directive 5122.5 unequivocally requires a reporter to have U.S. military permission to enter a combat zone. See Enclosure 3, ¶ E3.1.4. Accordingly, on October 30, 2001, Flynt wrote Assistant Secretary of Defense Victoria Clarke asking that "Hustler correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries *where hostilities may be occurring* as part of Operation Enduring Freedom." Appendix at p. 29 (emphasis added). As the Court recognized in its decision, the access he requested was not granted. Instead, Assistant Secretary Clarke explained that the American troops then in Afghanistan were all involved in "special operations activities" to which the Department of Defense could not offer the press access. Slip op. at 2-3, 8-9; Appendix at p. 34.

Flynt expressly requested battlefield and combat action access. Appendix at p. 29. This request was denied upon the Government's application of the "special operations" label. Therefore, under the Department of Defense's own rules, Flynt could not send a reporter in a Humvee over to Afghanistan to drive around the combat zone looking for battles to cover. Since appellants' amended complaint claimed that their First Amendment rights to press access were denied, and that the denial was not constitutionally justified, Flynt and LFP certainly made sufficient allegations to survive a motion to dismiss. Appellants' as-applied claims should not have been dismissed without allowing them an opportunity to have discovery with respect to, *inter alia*, the validity of the Government's justification for the denial of access.

CONCLUSION

Appellants respectfully request that the Court grant a panel rehearing pursuant to Fed. R. App. P. 40 to correct a misapprehension of the facts concerning the ability of journalists to cover American combat operations without the express approval of the Department of Defense. The Court's apparent belief that journalists are free to enter and remain in a combat zone without obtaining the permission of the Government for the purpose of reporting on United States military operations is contrary to Enclosure 3 to Department of Defense Directive 5122.5. This misapprehension of the facts is critical because it provides the foundation for the Court's characterization and treatment of appellants' First Amendment claims.

Respectfully submitted,
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CERTIFICATE OF SERVICE

IT IS HEREBY certified that four (4) copies plaintiff-appellants' petition for panel rehearing pursuant to Fed. R. App. P. 40 were served via Express Mail, Overnight, postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York upon Michael Raab, Esq., Assistant United States Attorney, Room 9136, 601 D Street, N.W., Washington, DC 20530.

Dated: March 18, 2004

/s/ Roger W. Wilcox, Jr.
Roger W. Wilcox, Jr.

EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 21, 2003 Decided February 3, 2004

[ENTERED: FEBRUARY 3, 2004]

No. 03-5075

LARRY FLYNT AND L.F.P., INC.,
APPELLANTS

v.

DONALD H. RUMSFELD,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE AND
DEPARTMENT OF DEFENSE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv02399)

Paul J. Cambria, Jr. argued the cause for appellants. With him on the briefs were *Roger W. Wilcox, Jr.* and *John G. Perazich.*

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, *Roscoe C. Howard, Jr.*, U.S. Attorney, and *Mark B. Stern*, Attorney, U.S. Department of Justice.

Before: EDWARDS, SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Larry Flynt and L.F.P., Inc. (the company that publishes *Hustler* magazine) (collectively "Flynt" or "appellants") sued Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense ("DOD") seeking, *inter alia*, injunctive relief against interference with its exercise of a claimed First Amendment right of the news media to have access to U.S. troops in combat operations, and claiming that DOD's delay in granting *Hustler*'s reporter access to U.S. troops in Afghanistan infringed that right. They further argued that DOD's Directive con- trolling media access to military forces facially violates this same constitutional right. The District Court dismissed Flynt's as-applied constitutional claims for lack of ripeness and standing, and refused to exercise its discretion under the Declaratory Judgment Act to declare the pertinent DOD Directive facially unconstitutional. This appeal followed. Be- cause we find that no such constitutional right exists, we will affirm the District Court's decision on other grounds.

I. Background

A. *Hustler*'s attempts to gain access

Shortly after the September 11, 2001, terrorist attacks, the United States military began combat operations in Afghani- stan in support of the global war on terrorism. On October 30, 2001, Flynt wrote a letter to the Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs, requesting that *Hustler* correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan

and other countries where hostilities may be occurring as part of Operation Enduring Freedom." Two weeks later, on November 12, 2001, Flynt wrote Clarke again requesting the same access and complaining about her failure to respond to his October 30 letter. Three days later, on November 15, Clarke sent Flynt a fax stating that access to ground operations was not immediately possible because "... the only U.S. troops on the ground in Afghanistan are small numbers of servicemen involved in special operations activity." Clarke explained that "[t]he highly dangerous and unique nature of their work makes it very difficult to embed media" with ground troops, but also stated that there had been "extensive" media access to other aspects of military operations. Specifically, "[s]cores of reporters and photographers have covered the [air] strikes, witnessed the humanitarian drops and interviewed dozens of [soldiers]." Clarke then provided Flynt with contact information for the Fifth Fleet Public Affairs Officer so that *Hustler* could have similar access.

Not satisfied with the access provided by DOD, and that other media outlets had received, Flynt did not contact the Fifth Fleet Public Affairs Officer; rather, he filed this lawsuit the day after he received Clarke's fax. Shortly after filing suit, Flynt sent another letter to Clarke on January 15, 2002, stating that "I did not contact [the Fifth Fleet Public Affairs Officer] because I did not request any such access or similar access. Rather, I specifically requested reporter access to actual battlefield combat activities." The letter also characterized Clarke's description of special operations activities as vague. Two weeks later, Flynt sent another letter to Clarke requesting an immediate response to his January 15 letter. Clarke responded by letter on February 4, 2002, reiterated DOD's position, and again described the access that was currently available. Furthermore, she stated that "all [your reporter] needs to do is work with [DOD's] people on the ground." She also provided Flynt with an

extensive list of contact persons and explained that DOD decisions regarding media access were controlled by Department of Defense Directive 5122.5.

On February 19, 2002, Flynt's lawyer sent an email to Lieutenant Commander Bonnie Hebert, one of the contacts Clarke had provided, requesting "permission to have *Hustler* magazine correspondents accompany and report on the activities of American soldiers on the ground in Afghanistan who are engaged in combat actions." Hebert responded three days later, asking "[w]here exactly in Afghanistan would you like to go?" and requesting the identity of the reporter. This began a series of communications that ultimately result- ed in David Buchbinder, a *Hustler* reporter, arriving at Bagram Air Force Base by May 7, 2002. Once in Afghanistan, Buchbinder placed himself on a list of reporters await- ing access to ground units. Since his arrival in Afghanistan, Buchbinder has filed several stories, at least one of which shows he has accompanied troops on a search for al Qaeda operatives.

B. The Directive

As stated above, DOD decisions regarding media access to combat troops are guided by Department of Defense Di- rective 5122.5. This Directive, issued on September 27, 2000, assigns the responsibility of "[e]nsur[ing] a free flow of news and information to the news media" to the Assistant Secretary of Defense for Public Affairs. Directive 5122.5. The Directive contains three enclosures. At issue in this case is Enclosure 3, entitled "Statement of DOD Principles for News Media." This enclosure begins with the command that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." ¶ E3.1.1. It then outlines the manner in which such coverage should occur. It allows for media pools, limited numbers of press persons

who represent a larger number of news media organizations and share material, but states that pools are not to be the "standard means of covering U.S. military operations." ¶ E3.1.2. Rather, pools are only to be used when space is limited or areas to be visited are extremely remote. ¶ E3.1.3. It also directs that "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." ¶ E3.1.7. In sum, the Directive represents an attempt to facilitate broad media coverage, and contains few restrictions, including limited restrictions on media communications for security purposes and expulsion for members of the media who violate the ground rules. *Id.* at ¶ ¶ E3.1.4. & E3.1.8. It also includes the caveat that "[s]pecial operations restrictions may limit access in some cases." ¶ E3.1.5.

C. Proceedings Below

Flynt and L.F.P., Inc., filed their initial complaint against the DOD and Secretary Rumsfeld on November 16, 2001, requesting preliminary and permanent injunctive relief. In addition, Flynt challenged Directive 5122.5 on the grounds that (1) enforcement of the policies violated his historical and constitutional rights of access to the battlefield; (2) enforcement of the policies amounted to a content-based prior restraint that deprived him of his First Amendment rights; (3) DOD's denial of his request was not narrowly tailored to further a substantial government interest; and (4) DOD's denial was arbitrary and capricious and made without reference to specific and objective standards.

After a hearing on Flynt's motion for a preliminary injunction, the District Court denied the motion, stating that it was "persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather

and report news" about U.S. military operations, subject to reasonable regulations. *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174, 175 (D.D.C. 2002). That being said, the District Court deter- mined that Flynt's likelihood of success on the merits was "far from clear," *id.* at 176, and that because of the quickly evolving factual situation any judicial decisions would "have to await the development of a fuller record," *id.* at 177.

On January 17, 2002, nine days after the District Court denied his motion for a preliminary injunction, Flynt filed an amended complaint. The amended claim presented ten claims, including: (Claim 1) a request for a declaration that the First Amendment guarantees Flynt a right of access to the battlefield, subject to reasonable regulations for safety and security; (Claims 2-4) a claim that DOD Directive 5122.5 fails to recognize and protect Flynt's First Amendment right of access to the battlefield and DOD's denial of his request violated these same rights; (Claim 5) an assertion that the Directive does not contain constitutionally required definite and objective standards for determining press access; (Claim 6) a claim that the Directive fails to place reasonable time limits on DOD's decision-making process; (Claim 7) a contention that the Directive does not provide for prompt administrative appeal; (Claims 8-9) a claim that the Directive imposes an unlawful content-based prior restraint on the media's constitutional right to battlefield access; and (Claim 10) a request for preliminary and permanent injunctive relief. By motion filed February 7, 2002, DOD moved to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56(c).

In considering DOD's motion, the District Court grouped appellants' claims as follows: claims 1-3, 8-9, and portions of claims 4-7 that alleged DOD improperly applied

Enclosure 3 to Flynt's request, were considered as "as-applied claims;" and claims 4-7 were considered as facial challenges to Enclosure 3. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94, 99-100, 103 (D.D.C. 2003). The District Court also considered Flynt's request for injunctive relief.

With regard to the as-applied claims, the District Court held they were unripe because the record did not reflect DOD ever made a final decision with respect to Flynt's request. *Id.* at 102. Furthermore, Flynt would suffer no concrete hardship by delaying review. *Id.* at 103. Also citing the absence of a final decision, the District Court held Flynt had not suffered a concrete injury-in-fact and, thus, had no standing to press the as-applied claims. *Id.*

Turning to the facial challenges, the District Court held that Flynt had both constitutional and prudential standing. *Id.* at 104. The Court stated that because the DOD had already crystallized its policies in Enclosure 3, the "posture of these particular claims ma[de] it inappropriate to dismiss on prudential ripeness grounds." *Id.* at 105. The District Court also held that dismissal on political question grounds was inappropriate because Flynt's claims did not "implicate the President's activities as Commander in Chief or the authority of the Secretary of Defense to direct military actions," nor did they require a court to apply principles beyond normal judicial competence. *Id.* at 107. The District Court did, however, refuse to exercise its discretion under the Declaratory Judgment Act to consider Flynt's facial claims. *Id.* Citing the considerable discretion the Declaratory Judgment Act gives to district courts, the court relied on the absence of a concrete controversy and the uncertainty surrounding Flynt's constitutional claims in withholding declaratory relief. *Id.* at 109-10. The court further refused to grant injunctive relief. *Id.* This appeal followed.

II. Analysis

This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Empagran S.A. v. F. Hoffman-LaRoche, LTD.*, 315 F.3d 338, 343 (D.C. Cir. 2003). In our review, we assume the truth of the allegations made and construe them favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). We review the District Court's decision to withhold declaratory relief for an abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

A. Appellants' Claims

As a threshold matter, it is important to clarify the right appellants seek to protect. In candor, it is not at all clear from appellants' complaint below or briefs in this court precisely what right they believe was violated or contend the courts should vindicate. After some pressing, at oral argument it became clear that they claimed a right, protected under the First Amendment, in their own words, to "go[ ] in [to battle] with the military." This right is different from merely a right to cover war. The Government has no rule-at least so far as Flynt has made known to us-that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DOD rule.

With that distinction made, appellants' claim comes more sharply into focus. They claim that the Constitution guarantees to the media-specifically *Hustler*'s correspondent-the right to travel *with* military units into combat, with all of the accommodations and protections that entails-essentially what is currently known as "embedding."

Indeed, at oral argument appellants' counsel stated that the military is "obligated to *accommodate* the press because the press is what informs the electorate as to what our government is doing in war."

B. Ripeness and Standing

We first consider appellees' contention that appellants lack standing to assert their "as applied" claims and that those claims were not ripe. For the reasons set forth below, we conclude that appellants do have standing and that the claims are ripe.

Standing requires that plaintiffs allege "an injury in fact" that is "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal punctuation omitted). In applying that test, we assume the validity of appellants' allegation of injury, although having crossed that threshold, we may ultimately determine it to be invalid. With that assumption, we hold that appellants do have standing to assert their as-applied claims. They asked for immediate access to accompany U.S. troops in combat, which they contend is their constitutional right, and that access was not granted. Therefore, appellants "ha[ve] suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000). They have standing to challenge the Directive as it was applied in this case.

In order to test the ripeness and justiciability of the claims, we again assume that they are otherwise valid. Ripeness analysis tests whether a question has sufficiently matured to be amenable to adjudication. The Supreme Court has explained that when considering whether an issue is ripe for judicial review, a court must "evaluate both the

fitness of the issues for judicial decision and the hardship to the parties" of refusing a decision. *Texas v. United States*, 523 U.S. 296, 301 (1998) (internal quotation marks and citation omitted). Further, a claim is unripe if it depends on "contingent future events." *Id.* at 300.

Appellants' claim is that credentialed press persons have an immediate right, upon request, to accompany U.S. troops in combat. So understood, the as-applied claims are ripe. Flynt requested that *Hustler* reporters gain access to combat operations, and that access was not immediately granted. Instead, access of another sort was provided-that of covering "the [air] strikes, witness[ing] the humanitarian drops and interview[ing]" soldiers. Flynt's claim does not depend on "contingent future events." He asked for immediate access, which he contends is his constitutional right, and that access was not granted. On these facts, the question is presented in a concrete factual setting and is fit for judicial review.

C. Facial Challenge

With all of appellants' claims properly before us, we now turn to their validity. Because it is clear to us that appellants have asserted no cognizable First Amendment claim, both the as-applied and facial challenges fail.

The facial challenge is premised on the assertion that there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions. There is nothing we have found in the Constitution, American history, or our case law to support this claim.

To support the position that there is such a constitutional right, appellants first point to cases that discuss the general purposes underlying the First Amendment. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("[t]he press was protected so that it could bare the secrets of government and inform the people.") (Black, J., concurring); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (the First Amendment supports the "free discussion of governmental affairs."). These cases, however, say nothing about media access to the U.S. combat units engaged in battle.

Appellants also cite cases that allow facial challenges to statutes or regulations that vest public officials with unfettered discretion to grant or deny licenses to engage in expressive activity, such as *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). This is not, however, a "license" decision. This appeal challenges regulations controlling *access* to government information and activity, not governmental limitation of expression. The Supreme Court has noted the difference. *See, e.g., Los Angeles Police Dept. v. United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999) (distinguishing government limits on access to information in its possession from a government restriction on disseminating information one already possesses).

Likewise, this Court has held that "freedom of speech [and] of the press do not create any per se right of access to government ... activities simply because such access might lead to more thorough or better reporting." *JB Pictures, Inc. v. Dep't of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996). Appellants admit they face a "dearth of case law concerning press access to battles." From this unenviable position, they ask us to look to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), for guidance.

In *Richmond Newspapers*, a plurality of the Supreme Court held that a constitutional right of public access to criminal trials existed based on a long history of such access in the United States and in England at the time our organic laws were created. *Id.* at 581. According to appellants, *Richmond Newspapers* established that the First Amendment may be interpreted to provide for a right of access to government operations, and that access is not limited to criminal trials. They assert that we must apply a *Richmond Newspapers* analysis to the facts of this case. We disagree.

In *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 2004 WL 46645 (Jan. 12, 2004), we held that there was no First Amendment right for plaintiffs to receive the identities of INS detainees and material witnesses who were detained in the wake of the September 11 attacks. Indeed, we made it clear that "[n]either the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Id.* at 934. For emphasis, we added that "neither this Court nor the Supreme Court has ever *indicated* that it would" do so. *Id* (emphasis in original). Instead, we noted that in all areas other than criminal proceedings, the Supreme Court has applied the general rule of *Houchins v. KQED*, 438 U.S. 1 (1978) (plurality opinion), not the exception of *Richmond Newspapers*. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935. *Houchins* held that the press have no First Amendment right of access to prisons, and in doing so stated that the First Amendment does not "mandate[ ] a right of access to government information or sources of information within the government's control." *Houchins*, 438 U.S. at 15. To summarize, neither this Court nor the Supreme Court has ever applied *Richmond Newspapers* outside the context of criminal proceedings, and we will not do so today.

Appellants argue that we did, however, use the *analysis* underlying the *Richmond Newspaper* decision in *JB Pictures Inc. v. Department of Defense*, 86 F.3d 236, 240 (D.C. Cir. 1996). In that case, several media and veterans organizations challenged a Department of Defense policy. That policy shifted ceremonies for deceased service members arriving from overseas from Dover Air Force base to locations closer to the service members' homes. It also gave the families of deceased military personnel the authority to limit press access to those ceremonies. Contrary to appellants' assertion, the extent of our *Richmond Newspapers* discussion in that case is contained in one sentence: "[i]t is obvious that military bases do not share the tradition of openness on which the Court relied in striking down restrictions on access to criminal court proceedings in ... *Richmond Newspapers*." *Id.* Thus *J.B. Pictures* not only does not support wholesale adoption of a *Richmond Newspapers* analysis in every case involving requests for access to government activities or information, it rejects such a rule.

Even if we were to apply a *Richmond Newspapers* test, which again, we do not, it would not support appellants' facial challenge to the Directive. As an initial matter, the history of press access to military units is not remotely as extensive as public access to criminal trials. Without going into great historic detail, it is sufficient that in *Richmond Newspapers* the Supreme Court relied on the "unbroken, uncontradicted history" of public access to criminal trials. *Id.* at 573. This includes the time when "our organic laws were adopted." *Id.* at 569. Indeed, even since "the ancient town meeting form of trial," the "people retained a 'right of visitation' which enabled them to satisfy themselves that justice was in fact being done." *Id.* at 572 (internal citations omitted).

No comparable history exists to support a right of media access to U.S. military units in combat. The very article cited by appellants for the proposition that media have traditionally had broad access to soldiers in combat does not support this position. *See* John E. Smith, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 Colum. J.L. & Soc. Probs. 291, 292-305 (1993). Beginning with the American Revolution, war reporting was primarily in the form of private letters from soldiers and official reports that were sent home and published in newspapers. *Id.* at 293. Indeed, the rise of the professional war correspondent did not begin until at least the time of the Civil War. *Id.* In addition, it is not entirely clear that in any of our early wars the media was actively embedded into units, which is the right appellants seek. In sum, even if we were to attempt a *Richmond Newspapers* analysis and consider the historical foundations of a right of media access to combat units, appellants' claim would fail miserably.

Even if *Richmond Newspapers* applied in this context, and even if there was a historical basis for media access to troops in combat, the Directive would still not violate the First Amendment. *Richmond Newspapers* expressly stated that "[j]ust as a government may impose reasonable time, place, and manner restrictions" in granting access to public streets, "so may a trial judge ... impose reasonable limitations on access to a trial." 448 U.S. at 581 n.18. These limitations could be based on the need to maintain a "quiet and orderly setting," or "courtrooms' ... limited capacity." *Id.* The Directive appellants challenge is incredibly supportive of media access to the military with only a few limitations. The Directive begins with the command that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." DOD Directive 5122.5 ¶ E3.1.1. It further orders military public affairs officers to "act as liaisons, but [ ] not [to] interfere with the reporting

process." *Id.* at ¶ E3.1.6. Additionally, "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." *Id.* at ¶ E3.1.7. The restrictions contained in the Directive are few, including: special operations restrictions; limited restrictions on media communications owing to electromagnetic operational security concerns; use of media pools when the sheer size of interested media is unworkable, such as at the beginning of an operation; and expulsion for members of the media who violate the ground rules. *Id.* at ¶ ¶ E3.1.2.-E3.1.8. Appellants have offered no reason to conclude that these restrictions are unreasonable. Even if *Richmond Newspapers* did apply, appellants' argument would fail.

The District Court, therefore, was more than correct when it stated that declaring the Directive unconstitutional would entail announcing an uncertain, yet "significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism." *Flynt v. Rumsfeld,* 245 F.Supp. 2d at 108. In no way did the District Court abuse its discretion in refusing to grant declaratory relief.

D. As-applied Challenges

We now turn to the as-applied challenges. As explained above, the constitutional right appellants assert does not exist, so the as-applied claim could only survive if this other- wise constitutional Directive was applied to them in some unconstitutional way. It was not. At no time has Flynt ever claimed that he, or *Hustler,* was treated differently under the Directive than any other media outlet. Nor has he claimed that the Directive is some sort of a sham that was not followed.

Even if there were some underlying constitutional right of media access to U.S. troops in battle, the Directive, and its application to appellants in this case, certainly would not have violated it. When Flynt made his request, Clarke explained that "the highly dangerous and unique nature of [special operations] work makes it very difficult to embed media" with ground troops, but also said that there had been "extensive" media access to other aspects of military operations. Specifically, "[s]cores of reporters and photographers have covered the [air] strikes, witnessed humanitarian drops and inter- viewed dozens of [soldiers]." Clarke then provided Flynt with contact information for the Fifth Fleet Public Affairs Officer so that *Hustler* could have similar access. The explanation was clear and consistent with the Directive, which states that "[s]pecial operations restrictions may limit access in some cases." Directive 5122.5 ¶ E3.1.5. Indeed, in con- formity with the letter and spirit of the Directive, Clarke not only explained why direct access to ground troops was not currently possible, but she also immediately gave Flynt the information necessary to receive the access that was avail- able. It was Flynt who failed initially to contact the designated public affairs officer. Ultimately, Flynt's reporter was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Qaeda operatives.

At oral argument, appellants asserted that DOD waited too long in making a final decision, and that they should have been required to promptly tell him that "this is a special forces operation, and you can't go." According to appellants, if this were the case, "at least there would be an answer and [we would have been] denied." This is, of course, precisely what happened. Within 16 days of Flynt's initial request, DOD responded by informing him that only special operations were underway. They also, however, advised him that access would be expanding in the future and that substantial access was already available. They

provided him with the necessary contact information to ensure that his *Hustler* reporter would be there with other media representatives. All of this occurred within 90 days of the September 11 attacks. In sum, there is nothing in the record that shows the otherwise constitutional Directive was applied to appellants in any illegal manner.

III. Conclusion

Because we hold that there is no constitutionally based right for the media to embed with U.S. military forces in combat, and because we further hold that the Directive was not applied to Flynt or *Hustler* magazine in any unconstitutional manner, the District Court's judgment is affirmed.

EXHIBIT B

Certificate as to Parties, Rulings and Related Cases

Pursuant to District of Columbia Circuit Rule 28(a)(1), appellants hereby certify the following:

A. Parties and Amici

The following have appeared as parties in this case:

Larry Flynt
L.F.P., Inc.
Donald H. Rumsfeld, Secretary of Defense
United States Department of Defense

No intervenors or amici have appeared in this case.

Rule 26.1 Corporate Disclosure Statement

L.F.P., Inc. is a publishing company that does not have any parent company. No publicly held company has a 10% or greater ownership interest in L.F.P., Inc. A Rule 26.1 statement was previously filed in this case pursuant to the order of this Court.

(B) Rulings Under Review

Appellants appeal from the Opinion and Order of the Honorable Paul L. Friedman, United States District Judge, dated February 14, 2003. The District Court's decision is reported at 245 F.Supp. 2d 94. The rulings on review before this Court are: (1) the District Court's ruling that appellants' as-applied claims that the respondents' media access policies deprived appellants of their First Amendment rights of access to the battlefield are not ripe for judicial decision (A 189-91)*; (2) the District Court's ruling that appellants lack Article III standing to bring before the court

their as-applied claims that the respondents' media access policies deprived appellants of their First Amendment rights of access to the battlefield (A 191-92); (3) the District Court's refusal to exercise its discretion under the Declaratory Judgment Act to consider appellants' First and Fifth Amendment facial challenges to respondents' media access policies (A 205); and (4) the District Court's refusal to exercise its discretion under the Declaratory Judgment Act to grant appellants' request for injunctive relief (A 205).

(C) Related Cases

This case has not been before this Court or any other court for review. Counsel is unaware of any related cases.

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* Numerical references contained in parentheses and preceded by "A" refer to pages of the Joint Appendix, unless otherwise noted.

EXHIBIT C

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LARRY FLYNT
9211 Robin Drive
Los Angeles, California, 90069,

and

LFP, Inc.
8484 Wilshire Boulevard, Suite 900
Beverly Hills, California 90211

Plaintiff,

v. **03-5075**

DONALD H. RUMSFELD
In his official capacity as
Secretary of Defense,
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

and

DEPARTMENT OF DEFENSE
1000 Defense Pentagon
Washington, DC 20301-1000

Defendants.

CERTIFICATE REQUIRED BY LCvR 26.1 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I, the undersigned, counsel of record for Larry Flynt and LFP, Inc., certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of LFP, Inc. which have any outstanding securities in the hands of the public:

There are no such companies, subsidiaries and/or affiliates.

By /s/ Paul J. Cambria, Jr.
PAUL J. CAMBRIA, JR.
Attorney of Record for
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(3)

No. 04-33

In the Supreme Court of the United States

LARRY FLYNT AND L.F.P., INC., PETITIONERS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Defense Department Directive No. 5122.5 (2000) is consistent with the First Amendment.

2. Whether the district court correctly resolved petitioners' claims without allowing discovery.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 355 F.3d 697. The opinion of the district court (Pet. App. 20a-47a) is reported at 245 F. Supp. 2d 94.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2004. A petition for rehearing was denied on April 7, 2004 (Pet. App. 50a). The petition for a writ of certiorari was filed on July 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Department of Defense (DoD) Directive No. 5122.5 (2000) assigns the Assistant Secretary of Defense for Public Affairs the responsibility of ensuring "a free flow of news and information to the news media, the general public, the internal audiences of the Department of Defense, and the other applicable fora, limited only by national security constraints as authorized by Executive Order 12958 * * * and valid statutory mandates or exemptions." Gov't C.A. Br. Add. 2a (para. 3.2). The Directive includes three enclosures. Enclosure 1 includes a list of other DoD Instructions and Directives that are referenced in Directive No. 5122.5. *Id.* at 7a. Enclosure 2 lists five "principles of information" that apply in carrying out DoD's policy "to make available timely and accurate information so that the public, the Congress, and the news media may assess and understand the facts about national security and defense strategy." *Id.* at 8a.

Enclosure 3, at issue here, is entitled "Statement of DoD Principles for News Media." Pet. App. 52a. Enclosure 3 provides that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." *Ibid.* (para. E3.1.1). In some circumstances, however, mission security and logistical concerns may limit or preclude media participation. For example, media pools, in which a limited number of journalists accompany United States troops and agree to share their work with other news organizations, "sometimes may provide the only means of early access to a military operation." *Ibid.* (para. E3.1.2). "Even under conditions of open coverage, pools may be applicable for specific events, such as those at extremely

remote locations or where space is limited." *Ibid.* (para. E3.1.3).

Enclosure 3 also provides that "[j]ournalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations." Pet. App. 52a (para. E3.1.4). The Enclosure also provides that "[j]ournalists shall be provided access to all major military units," but recognizes that "[s]pecial operations restrictions may limit access in some cases." *Ibid.* (para. E3.1.5).

DoD Directive No. 5122.5 includes several other provisions that balance the need for security with the media's desire for information. Thus, Enclosure 2 states that "[i]nformation will not be classified or otherwise withheld to protect the Government from criticism or embarrassment." Gov't C.A. Br. Add. 8a (para. E2.1.3). And Enclosure 3 instructs that military public affairs officers "should act as liaisons, but should not interfere with the reporting process." Pet. App. 53a (para. E3.1.6). It further provides that "[u]nder conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." *Ibid.* (para. E3.1.7).

2. On October 30, 2001, petitioners requested that *Hustler* magazine correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom." Pet. App. 131a. Petitioners later renewed that request. *Id.* at 133a-134a.

In response, Assistant Secretary of Defense for Public Affairs Victoria Clarke informed Mr. Flynt that

the only United States troops on the ground in Afghanistan at that time were "small numbers of servicemen involved in special operations activity" and that "[t]he highly dangerous and unique nature of their work [made] it very difficult" to provide direct media access to those troops. Pet. App. 136a. Assistant Secretary Clarke explained that DoD already had "facilitated extensive access to military operations thus far in the war on terrorism. Scores of reporters and photographers have covered the strikes, witnessed the humanitarian drops and interviewed dozens of men and women serving in the region." *Ibid.* She provided the name and telephone number of the 5th Fleet Public Affairs Officer who was handling media requests at that time and invited Mr. Flynt to have his reporters call if they were interested in obtaining similar access. *Ibid.*

Because petitioners "were not interested in and had not requested access to the types of press coverage offered by Assistant Secretary Clarke, [petitioners] did not contact the 5th Fleet Public Affairs Officer." Pet. App. 112a (para. 73). Instead, the day after receiving the Assistant Secretary's letter, they filed the present suit. See *id.* at 58a (Docket Entry 1).

In January 2002, petitioners renewed their "request for permission to have a reporter employed by [petitioners] accompany ground troops in order to cover actual combat activity carried out in connection with the current military campaign known as Operation Enduring Freedom." Pet. App. 146a-147a. Assistant Secretary Clarke invited petitioners to work with the military's public affairs officers to arrange for access to United States troops. *Id.* at 150a. Because the military had increased its ground presence in Afghanistan since petitioners' earlier correspondence in the fall of 2001, Assistant Secretary Clarke was able to provide Mr.

Flynt with a list of public affairs officers who were on the ground in Afghanistan. Accordingly, petitioners were provided the names, telephone numbers, and e-mail addresses of several officers to contact, depending on which military unit they would like to visit. *Id.* at 152a-154a.

Petitioners' counsel sent an e-mail message to one of the persons on that list, Lt. Col. Bonnie Hebert, requesting "permission to have a Hustler magazine correspondent embed with American land forces in Afghanistan for the purposes of accompanying them on their missions and reporting news of their activities, particularly in combat situations, subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations." Pet. App. 155a. Lt. Col. Hebert informed petitioners' counsel that "[w]e are working on your request" and asked for further details regarding where petitioners would like to go, whom they wanted to send, "and when and what type of operations they want[ed] to cover and for how long." *Id.* at 159a. Sergeant Aaron Lawrence later e-mailed petitioners' counsel setting forth details about locations in Afghanistan where a reporter could cover operations, including the best place "to actually stay with combat soldiers in the Afghan theatre." *Id.* at 161a.

On March 8, 2002, David Buchbinder, a correspondent reporting on activities in Afghanistan for *Hustler*, e-mailed Sergeant Lawrence, explaining that his "primary objective" was "to physically stay with soldiers at their bases, and to accompany them on combat missions." Pet. App. 165a. Mr. Buchbinder also requested

"a list of military media liaisons on the ground in Afghanistan, and their contact numbers." *Id.* at 166a. Respondents subsequently provided that contact information. *Id.* at 168a.

Mr. Buchbinder arrived at Bagram Air Base on March 18, 2002, and stayed two nights, covering various events and interviewing soldiers. Pet. App. 178a (para. 4). He returned on April 6, 2002, and conducted additional interviews. *Ibid.* On May 7, 2002, Mr. Buchbinder filed an affidavit stating that he was at Bagram Air Base and had been placed on the requisite waiting list for journalists seeking access to combat missions. *Id.* at 181a (para. 12). Mr. Buchbinder also stated that he had made a request to the appropriate authority to accompany special forces operations and had been informed that officials at Bagram Air Base were awaiting approval from officials in the United States to allow reporters to accompany special forces on missions. *Id.* at 182-183 (paras. 24, 35). At the time of his affidavit, Mr. Buchbinder had not accompanied soldiers on any missions. *Id.* at 185a (para. 46). But he had been informed that his position on the waiting list was rising, *id.* at 184a (para. 43), and that the military "was lobbying with British forces to have [him] placed on one of their missions," *ibid.* (para. 45).

David Buchbinder ultimately published various articles recounting his experiences in Afghanistan, including two articles in *Hustler*. See David Buchbinder, *Grunt Work: Army Troops Mop up a Special Forces War*, Hustler, Jan. 2003, at 90; David Buchbinder, *We Came, We Saw, We Pulled Guard*, Hustler, Oct. 2002, at 94; David Buchbinder, *A Soldier's Life in Afghanistan*, Christian Science Monitor, Feb. 27, 2003, at 11; David Buchbinder, *Response to Terror a Military That Lacks One Crucial Element: Weapons*, Los Angeles

Times, Oct. 6, 2002, at A36. The articles in *Hustler* provide what purport to be first-hand accounts of (1) a patrol mission that proceeded via armed convoy from Bagram Air Base, and (2) an operation involving a battalion of nearly 400 soldiers searching for a senior al Qaeda operative and fighters under his command. See Gov't C.A. Br. Add. 17a, 20a-24a.

3. Petitioners filed their original complaint on November 16, 2001, and moved for a preliminary injunction ten days later. Pet. App. 58a. The district court denied the preliminary injunction motion. *Id.* at 137a-142a. Petitioners filed an amended complaint raising both as-applied and facial challenges to Enclosure 3 of Directive No. 5122.5. See *id.* at 6a-7a, 99a-129a. The government moved to dismiss the amended complaint, and the district court granted that motion. *Id.* at 20a-47a.

The district court held that petitioners' as-applied challenges were not ripe, and that petitioners lacked standing, because "defendants have not made a final decision with respect to [petitioners'] request for access to combat ground forces in battle." Pet. App. 29a. The court noted that, at the time the complaint was filed, DoD was working to provide petitioners' reporter with access to United States ground troops.

The district court held that petitioners' facial challenges were justiciable. Pet. App. 34a-41a. But the court declined to exercise its discretion to resolve those claims for declaratory and injunctive relief. The court determined that "the more prudent course is to delay resolution of these constitutional issues until and unless [petitioners] are denied access after having pursued their request through normal military channels." *Id.* at 46a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court held that petitioners had standing and that their claims were ripe for judicial review. *Id.* at 9a-10a. The court then rejected petitioners' claims on the merits.

The court stated that petitioners' facial challenge "is premised on the assertion that there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions." Pet. App. 10a. The court held that "[t]here is nothing we have found in the Constitution, American history, or our case law to support" petitioners' facial challenge to Directive No. 5122.5. *Ibid.*

The court also rejected petitioners' as-applied challenges. The court explained that "[a]t no time has Flynt ever claimed that he, or *Hustler*, was treated differently under the Directive than any other media outlet. Nor has he claimed that the Directive is some sort of sham that was not followed." Pet. App. 15a. The court noted that, in initially denying petitioners' reporter access to ground troops, "in conformity with the letter and spirit of the Directive, [Assistant Secretary of Defense] Clarke not only explained why direct access to ground troops was not currently possible, but she also immediately gave Flynt the information necessary to receive the access that was available." *Id.* at 16a. The court explained that "[i]t was Flynt who failed initially to contact the designated public affairs office. Ultimately, Flynt's reporter was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Quaeda operatives." *Ibid.*

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners (Pet. 11) ask this Court to determine "the extent to which, if at all, the First Amendment affords the press a right of access to combat zones controlled by the U.S. military." As the court of appeals explained (Pet. App. 8a), however, "[t]he Government has no rule—at least so far as Flynt has made known to us—that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DOD rule." Accordingly, as petitioners acknowledge (Pet. 11 n.1), the courts below did not resolve whether the First Amendment guarantees the press a right to obtain access to overseas combat zones without the assistance of the military. There is similarly no reason for this Court to address that issue for the first time in this litigation. Because petitioners have not shown that the government has prevented them from independently traveling to combat areas in Afghanistan, the question whether such a restriction would be consistent with the First Amendment is not presented here.

As the court of appeals explained (Pet. App. 8a), "it is not at all clear from [petitioners'] complaint below or briefs in this court precisely what right they believe was violated or contend the courts should vindicate." Petitioners state (Pet. 12) that they "did not, and do not, contend that the military is under any obligation,

constitutional or otherwise, to furnish accommodations or other support to journalists in the combat zone." To the extent that petitioners nonetheless claim that the government has a First Amendment obligation to provide them with access to combat zones, petitioners have not established the factual predicate for such a claim. As the court of appeals recognized, petitioners' reporter "was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Quaeda operatives." Pet. App. 16a.

In any event, the court of appeals correctly held that the First Amendment does not require the military to furnish petitioners with access to overseas combat zones. This Court repeatedly has distinguished between government actions that interfere with protected expression and those that merely deny access to government information or property that is not open to the public. In general, actions that merely deny access to government property or information that is not open to the public do not implicate the First Amendment. See, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999); *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell* v. *Procunier*, 417 U.S. 817, 834-835 (1974).

The Court has recognized one limited exception to that general rule. In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Court held that the First Amendment implicitly incorporates a public right of access to criminal trials. See *id.* at 564-571. The Court noted that there had been a 1000-year "unbroken, uncontradicted history" of public access to criminal trials in Anglo-American law, running from

"before the Norman Conquest" to the present. *Id.* at 573; see *id.* at 565-573. The Court reasoned that this tradition was reflected in the Sixth Amendment guarantee of a "public trial" to criminal defendants, *id.* at 574, that the First Amendment "was enacted against the backdrop of the long history" of public criminal trials, *id.* at 575, and that public access "inheres in the very nature of a criminal trial under our system of justice," *id.* at 573.

Unlike access to criminal trials, there has not been a 1000-year "unbroken, uncontradicted history" of public access to foreign combat zones. The history of access that petitioners reference (Pet. 20-22) is, by their own account, neither "unbroken" nor "uncontradicted." Moreover, this Court "over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable." *Greer* v. *Spock*, 424 U.S. 828, 837 (1976). That special function has overriding significance in foreign combat zones and precludes recognition of a First Amendment right of the press to accompany ground troops into overseas combat.

2. Petitioners further contend (Pet. 23-24) that they should have been permitted to conduct discovery. But the court of appeals correctly determined that petitioners' claims fail as a matter of law. And, in any event, the fact-bound question whether petitioners should have been allowed discovery does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2004